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ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 16

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TITLE 16: PRACTICE, PROCEDURE, AND COURTS (CHAPTERS 90-126)

Prepared by the Editorial Staff of the Publisher
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United States Supreme Court Reports, through November 17, 2005.

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Arkansas Law Notes through the 2001 Edition.

Arkansas Law Review through Volume 57, p. 1015.

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User's Guide

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 16

PRACTICE, PROCEDURE, AND COURTS

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A.C.R.C. Notes. References to "this chapter" in §§ 16-90-803 and 16-90-804 may not apply to §§ 16-90-309, 16-90-310, 16-90-719 and 16-90-906, and subchapters 10-12 which were enacted subsequently.

Publisher's Notes. Some provisions of this chapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

Subchapter 1 — General Provisions

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16-90-101. Arrest of judgment.
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16-90-119. Confiscation of deadly weapons.
16-90-120. Felony with firearm.
16-90-121. Second or subsequent felony with firearm.
16-90-122. Post-conviction release of nonviolent offenders.

A.C.R.C. Notes. As to authority of sixth judicial circuit court judges, as a condition of probation or suspension of sentence, to require criminal defendants to participate in a home detention program to be supervised electronically, see Acts 1989, No. 809. Pursuant to § 21 of that act, its provisions shall expire on December 31, 1990.

Cross References. Disposition of offenders, § 5-4-101 et seq.

Preambles. Acts. 1939, No. 117, contained a preamble which read: "Whereas, in the transfer of inmates from the State Farm for Women to a portion of the property operated as a training school for girls by the provisions of Act 203 of the Acts of 1935, Sections 12946 and 12949 of Pope's Digest of the Statutes of Arkansas, some doubt is raised as to the authority to commit such convicts and to discipline, parole and discharge them ..."

Effective Dates. Acts 1859, No. 147, § 3: effective on passage.

Acts 1887, No. 148, § 2: effective on passage.

Acts 1897, No. 37, § 2: Jan. 1, 1898.

Acts 1907, No. 440, § 8: effective on passage.

Acts 1923, No. 76, § 4: effective on passage. Emergency declared. Approved Feb. 9, 1923.

Acts 1923, No. 152, § 2: effective on passage. Emergency declared. Approved Feb. 21, 1923.

Acts 1939, No. 117, § 6: approved Feb. 22, 1939. Emergency clause provided: "It is found and declared by the General Assembly to be a fact that there should be a segregation of sexes in the penal Institutions of this State; that there is some question as to the rights and duties of trial courts in rendering judgments for the commitment of women to the Girls Industrial School, and that all doubt can and should be removed as to the authority and jurisdiction of the Board in charge of the Training School for Girls over women convicts, the fact being that their authority and jurisdiction is at the present time questionable. Therefore, it is found an emergency exists and this Act shall take effect and be in full force from and after its passage."

Acts 1953, No. 267, § 2: approved Mar. 10, 1953. Emergency clause provided: "Whereas the laws of the State of Arkansas have heretofore been inadequate to suppress such crimes and misdemeanors, and it being thought that the confiscation of deadly weapons used in the commission of crimes will further tend to preserve the peace and quiet of the State of Arkansas, an emergency is hereby declared to exist,

and this Act shall take effect and shall be in full force and effect from and after its passage."

Acts 1971, No. 72, § 3: Feb. 9, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that under the present law, females over eighteen (18) years of age who are found to be alcoholics may be committed by the circuit court to the Arkansas State Reformatory for Women; that this law is discriminatory against women since male alcoholics are not subject to commitment to the Arkansas State Penitentiary; that it is essential to the well being of citizens of this State that this inequity be corrected immediately, and that this Act is designed to correct such inequity, and should therefore be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1971, No. 193, § 2: Mar. 2, 1971. Emergency clause provided: "It has been found and is declared by the General Assembly that some confusion exists as to the authority of the courts of this state to adjudge sentences of conviction to run concurrent with a sentence of another court of the state, a court of a different state or a federal court, and the courts should be given proper discretion as to sentencing and punishment. Therefore, an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1971, No. 195, § 3: Mar. 2, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Arkansas Department of Correction has been required to accept the commitment of women convicted of the misdemeanors of prostitution, habitual intoxication, drug using, contributory dependency and conducting a disorderly house; that State correctional institutions are not the proper institutions to receive women found guilty of these misdemeanors. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1971, No. 333, § 15: Mar. 22, 1971. Emergency clause provided: "Whereas, it is deemed that criminal appeals should, so far as is feasible, be consistent with the statutes governing civil appeals and,

"Whereas, injustice sometimes results from the use and application of the present statutes applicable to the appeal of criminal cases and,

"Whereas, some confusion exists as to the manner in which criminal appeals are perfected, this Act is necessary for the protection of a public peace, health and safety, and an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

Acts 1973, No. 818, § 8: Apr. 16, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that some degree of confusion exists in the courts of this State concerning presentence and probation procedures available to courts in handling of persons convicted of crimes, and that the present status of the law concerning the suspension of sentences imposed upon such persons is not to the best interest of the public and the end of justice because the courts do not have sufficient guidelines and authority by which to employ their discretion in granting such suspension, nor do the counties have adequate presentence or probation officers to effectively carry out a rehabilitation program, and that this Act is immediately necessary to correct this situation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of th public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 956, § 5: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is confusion as to whether present law allows courts to suspend execution of sentences in proper cases; that such power is vital to the administration of justice and that confusion will continue until this Act becomes effective. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety

shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain. 3 ALR 4th 1181.

Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence. 8 ALR 4th 1028.

Power of court, during same term, to increase severity of sentence. 26 ALR 4th 905.

Power of court to increase severity of unlawful sentence. 28 ALR 4th 147.

Sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial. 34 ALR 4th 888.

Permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine. 35 ALR 4th 192.

Using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence. 37 ALR 4th 1168.

Expert testimony as to appropriate punishment for convicted defendant. 47 ALR 4th 1069.

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 785 et seq.

C.J.S. 23A, 24 C.J.S., Crim. L., § 1453 et seq.

16-90-101. Arrest of judgment.

(a) A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered upon a verdict against him or her or on a plea of guilty.

(b) The motion may be made at any time before judgment, or after judgment during the same term of the court.

(c) The only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

(d) The court may arrest the judgment without motion on observing the defect in the indictment named in subsection (c) of this section.

(e) If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense, he or she may be detained in custody or on bail in the manner and for the time prescribed in § 16-85-706(b). However, otherwise he or she shall be discharged on the arrest of judgment.

History. Crim. Code, §§ 271-275; C. & M. Dig., §§ 3222-3225; Pope's Dig., §§ 4062-4065; A.S.A. 1947, §§ 43-2206 — 43-2210.

Publisher's Notes. This section may be affected by § 16-91-105 and ARCrP 36.22 [now ARCrP 33.3] as to the time for filing a motion in arrest of judgment.

Cross References. Time for filing motion for new trial, motion in arrest of judgment, or any other application for relief, § 16-91-105, ARCrP 33.3.

CASE NOTES

Analysis

Construction.
Construction of indictment.
Grounds for motion.
Sufficiency of information.
Verdict.

Construction.

Subsection (c) requires that every material fact necessary to constitute an offense be alleged in the indictment. Barton v. State, 29 Ark. 68 (1874); Younger v. State, 37 Ark. 116 (1881) (decisions prior to 1937 amendment of § 16-85-403).

Construction of Indictment.

Indictment will, if possible, be so construed as to sustain the verdict. Loudermilk v. State, 110 Ark. 549, 162 S.W. 569 (1913); Davis v. State, 131 Ark. 542, 199 S.W. 902 (1917).

Where the facts alleged in an indictment for robbery constituted a public offense, a motion in arrest of judgment was properly overruled. Williams v. State, 153 Ark. 289, 239 S.W. 1065 (1922).

Every material fact constituting an offense must be alleged but, in determining the question of whether a public offense is properly alleged, the language used will be construed in favor of the validity of the indictment unless such interpretation is contrary to the plain and usual meaning of the words in the indictment. Dover v. State, 165 Ark. 496, 265 S.W. 76 (1924).

Grounds for Motion.

Motion in arrest of judgment cannot raise questions as to the sufficiency of the evidence; its only province is to question the sufficiency of the indictment, or at the utmost only such errors as appear on the record. McCoy v. State, 46 Ark. 141 (1885); State v. Bledsoe, 47 Ark. 233, 1 S.W. 149 (1886).

Evidence insufficient to establish grounds for motion in arrest of judgment. Ince v. State, 77 Ark. 426, 93 S.W. 65 (1906); Shaw v. State, 194 Ark. 272, 108 S.W.2d 497 (1937); Haraway v. State, 202 Ark. 845, 153 S.W.2d 161 (1941).

The only ground upon which a judgment may be arrested is that facts stated in the indictment or information do not constitute a public offense within the jurisdiction of the court. Bowen v. State, 205 Ark. 380, 168 S.W.2d 836 (1943).

Sufficiency of Information.

If a defendant in a criminal case desires to question the sufficiency of the information, he must either file a demurrer to the information or file a motion in arrest of judgment; he cannot raise the question by appeal. England v. State, 234 Ark. 421, 352 S.W.2d 582 (1962).

Verdict.

Motion should be granted when accused is found guilty of an offense not charged or included in the charge made in the indictment. Jones v. State, 100 Ark. 195, 139 S.W. 1126 (1911).

Defendant convicted on a plea of nolo contendere to sexual misconduct was not entitled to an arrest of judgment; although § 5-14-107, the statute defining sexual misconduct as a criminal offense, had been repealed before he entered his plea of nolo contendere, the statute was in effect at the time he committed the offense. Holt v. State, 85 Ark. App. 151, 147 S.W.3d 699 (2004).

Cited: Clark v. State, 271 Ark. 866, 611 S.W.2d 502 (1981).

16-90-102. Presentence officers.

(a) Every judicial district shall have the authority to appoint one (1) or more presentence officers to make such reports to a circuit court as it deems desirable as to the past conduct of any defendant that appears before the court.

(b)(1) The appointment of presentence officers shall be in writing and entered upon the records of the court.

(2) The presentence officer shall have such jurisdiction within the judicial district as is stated in the order of the appointment.

(3) One officer may be appointed chief presentence officer for the district.

(c)(1) The presentence officers shall be paid from the counties composing the judicial district in equal monthly increments as approved by the quorum court of each county but not to exceed thirteen thousand five hundred dollars ($13,500) per year.

(2) Federal funds disbursed under the direction of the Arkansas Crime Commission [abolished] may be used to pay all or any portion of the salaries of the presentence officers.

History. Acts 1973, No. 818, § 3; 1975, No. 602, § 2; A.S.A. 1947, § 43-2333.

Publisher's Notes. Acts 1991, No. 343, § 2, abolished the Arkansas Crime Commission which had been created under former § 12-7-101.

16-90-103. Sentences without notice void.

All sentences made, rendered, or pronounced by any of the courts of the state against anyone without actual or constructive notice, and all proceedings had under such sentences, shall be absolutely null and void.

History. Acts 1859, No. 147, § 1, p. 172; C. & M. Dig., § 6238; Pope's Dig., § 8194; A.S.A. 1947, § 29-107.

Publisher's Notes. Acts 1859, No. 147, § 1, p. 172, is also codified as § 16-65-108.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Service of Process — Default Judgment, etc., 40 Ark. L. Rev. 381.

CASE NOTES

Invalid Notice.

Where a resident defendant is served with constructive service, the proceedings are null and void. Barksdale v. Barksdale, 170 Ark. 228, 279 S.W. 789 (1926).

Cited: Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988).

16-90-104. Commitment of women for felony.

Women who are convicted of or who plead guilty to the commission of felonies may be committed to the Department of Correction by any court of criminal jurisdiction.

History. Acts 1939, No. 117, § 1; 1971, No. 72, § 1; 1971, No. 195, § 1; A.S.A. 1947, § 46-804.

16-90-105. Verdict of guilty.

(a) Upon the return of a verdict of guilty, if tried by a jury, or the finding of guilt if tried by the circuit court without a jury, sentence may be announced.

(b) The judgment of the court may be then and there entered for sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court not more than thirty (30) days thereafter, at which time probation reports may be submitted, matters of mitigation presented, or any other matter heard that the court or the

defendant might deem appropriate to consider before the pronouncement of sentence and entry of the formal judgment.

(c) If the defendant is ordered to be held without bond or for any reason whatever, the defendant may file a written demand for immediate sentencing, whereupon the trial judge shall cause formal sentence and judgment to be made of record.

(d) At the time sentence is announced and judgment entered, the trial judge must advise the defendant of his or her right to appeal and either fix or deny bond.

(e) In its discretion, the trial judge may order:

(1) The defendant released from custody on his or her own recognizance;

(2) Another bond fixed;

(3) The defendant to remain subject to the provisions of his or her bond if the defendant appeared at trial on bail bond; or

(4) The defendant to the custody of the sheriff to be held without bond.

History. Acts 1971, No. 333, § 2; A.S.A. 1947, § 43-2301.

Cross References. Right of appeal, § 16-91-101 et seq., RAP-Crim 1.

Release pending appeal, RAP-Crim 6.

Sentencing and entry of judgment, ARCrP 33.2

RESEARCH REFERENCES

UALR L.J. DiPippa, Suspending Imposition and Execution of Criminal Sentences, Etc., 10 UALR L.J. 367.

CASE NOTES

Analysis

In general.
Dual judgments.
Inconsistent entries.
Notice of right to appeal.
Objections.

In General.

A judgment of conviction and sentence is required to be entered in each case; such judgment is a final judgment and not an interlocutory order subject to change. Hunter v. State, 278 Ark. 428, 645 S.W.2d 954 (1983).

Dual Judgments.

When a court grants unauthorized dual judgments of sentence and one is imposed and served, and the other is the suspension of a sentence, there is an election by operation of law and the sentencing court has elected to order the sentence actually imposed; the other is void. Hunter v. State, 278 Ark. 428, 645 S.W.2d 954 (1983).

Inconsistent Entries.

Where there is inconsistency between the docket entry and the certified copy of the judgment, the certified copy prevails. Hunter v. State, 278 Ark. 428, 645 S.W.2d 954 (1983).

Notice of Right to Appeal.

Evidence sufficient to show defendant was not prejudiced where, upon conviction, court remanded defendant to custody of the sheriff without expressly advising defendant of his right to appeal and without fixing or denying bond. Tate v. State, 258 Ark. 135, 524 S.W.2d 624 (1975).

Petitioner was never advised by the trial court of his right to appeal and was granted leave to appeal. Easter v. Lockhart, 773 F. Supp. 1226 (E.D. Ark. 1991).

Objections.

For cases discussing defendant's re-

sponsibility in particular circumstances to object or to comment before sentencing, see: Brickey v. State, 148 Ark. 595, 231 S.W. 549 (1921) Morrison v. State, 159 Ark. 323, 251 S.W. 873 (1923) (preceding decisions under prior law); Coleman v. State, 257 Ark. 538, 518 S.W.2d 487 (1975); Noland v. State, 265 Ark. 764, 580 S.W.2d 953 (1979); Cooper v. State, 278 Ark. 394, 645 S.W.2d 950 (1983).

Cited: Hammon v. State, 270 Ark. 307, 605 S.W.2d 6 (1980); Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988); Harrison v. State, 303 Ark. 247, 796 S.W.2d 329 (1990).

16-90-106. Informed defendant for felony required.

(a) Judgment shall not be rendered against a defendant in case of felony, except in his or her presence. If the defendant is in custody, he or she shall be brought into court by the proper officer, and if not in custody, a bench warrant similar to the bench warrant on indictments shall be issued for his or her arrest.

(b) When the defendant appears for judgment, he or she must be informed by the court of the nature of the indictment, his or her plea, and the verdict thereon, if any. He or she must be asked if he has any legal cause to show why judgment should not be pronounced against him or her.

(c) He or she may show for cause against the judgment any sufficient ground for a new trial or for arrest of judgment.

(d) The law in relation to the punishment, pains, and penalties of all persons when convicted, so far as relates to him or her, and the sentence, shall be read to each convict. The consequences shall be fully declared to him or her, so that the person so convicted and sentenced shall in no instance be deemed ignorant of the sentence pronounced on him or her.

History. Rev. Stat., ch. 44, div. 3, art. 7, § 8; Crim. Code, §§ 280-282; C. & M. Dig., §§ 3234-3236, 3241; Pope's Dig., §§ 4074-4076, 4081; A.S.A. 1947, §§ 43-2302 — 43-2305.

Cross References. Procedure when insanity an issue, § 16-86-101 et seq.

Right to interpreter, § 16-89-104.

CASE NOTES

Analysis

Allocution.
Appeal.
Constitutional right.
Effect of sentence.
Resentencing.
Showing cause against judgment.

Allocution.

Failure of the trial court to accord the right of allocution is error. Smith v. State, 257 Ark. 781, 520 S.W.2d 301 (1975); Tate v. State, 258 Ark. 135, 524 S.W.2d 624 (1975).

Where a question is addressed to the defendant which affords him an opportunity to express why sentencing should not be pronounced, it is unnecessary that the precise language of subsection (b) be used. Clark v. State, 264 Ark. 630, 573 S.W.2d 622 (1978); White v. State, 266 Ark. 499, 585 S.W.2d 952 (1979).

Where the trial court afforded defendant more than ample opportunity to be heard, defendant was not denied his right to allocution. Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979).

Where the trial judge failed to ask defendants why judgment should not be pronounced, there was no prejudice to defendants. Heard v. State, 272 Ark. 140, 612 S.W.2d 312 (1981).

Defendants were not entitled to a bifurcated trial so they could present evidence of extenuating or mitigating circumstances at a separate sentencing proceeding where they did not choose to testify at the trial on the merits even though they were afforded the opportunity to address the court before sentencing. Izzard v. State, 10 Ark. App. 265, 663 S.W.2d 192 (1984).

Subsection (b) is satisfied if the court affords the defendant his right of allocution at the time judgment is pronounced. Neff v. State, 287 Ark. 88, 696 S.W.2d 736 (1985).

Where the right of allocution is completely ignored by the court, defendant must affirmatively prove prejudice. Neff v. State, 287 Ark. 88, 696 S.W.2d 736 (1985).

Although the trial judge failed to formally pronounce the verdict of guilty as required by subsection (b), where the defendants were represented by counsel, made no objection, did not file a motion for a new trial, and had not suggested in their appellate brief any possibility of prejudice as a result of the omission, reversal was not warranted. Willis v. State, 299 Ark. 356, 772 S.W.2d 584 (1989).

The total failure to afford a convicted defendant the right to state any legal reason why judgment should not be pronounced is reversible error. Hill v. State, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Where defendant was invited to speak during the sentencing proceeding, he suffered no prejudicial error as to allocution. Hill v. State, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied, 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998).

Appeal.

Failure of the court to advise defendant of his right to appeal conviction and to fix or deny bond on appeal at the time of sentencing held not to prejudice defendant. Tate v. State, 258 Ark. 135, 524 S.W.2d 624 (1975).

Constitutional Right.

Sentencing is a critical stage of a criminal case, and the defendant has a constitutional right to be present at any stage of the criminal proceeding that is critical to its outcome. Lowery v. State, 297 Ark. 47, 759 S.W.2d 545 (1988).

Effect of Sentence.

Where the record is silent, it is presumed that the circuit court complied with the provisions of subsection (d), and a failure to do so would be no cause of reversal. Brown v. State, 13 Ark. 96 (1852).

Evidence showed noncompliance with subsection (d). Culpepper v. State, 268 Ark. 263, 595 S.W.2d 220 (1980).

Where sentencing was not in conformity with subsection (d) but there was no objection by either party and no appeal from the sentence, the irregularities were waived. Cooper v. State, 278 Ark. 394, 645 S.W.2d 950 (1983).

Defendant is entitled to know the effect of his sentences. Hunter v. State, 278 Ark. 428, 645 S.W.2d 954 (1983).

Resentencing.

The presence of the defendant is required at resentencing as well. Lowery v. State, 297 Ark. 47, 759 S.W.2d 545 (1988).

Showing Cause Against Judgment.

Subsection (c) prohibits examination of jurors, as to their deliberations, to establish grounds for a new trial, unless it can be shown that the verdict was by lot. Williams v. State, 264 Ark. 77, 568 S.W.2d 30 (1978).

Cited: Johnson v. State, 225 Ark. 719, 284 S.W.2d 627 (1955); Coleman v. State, 257 Ark. 538, 518 S.W.2d 487 (1975); Goodwin v. State, 263 Ark. 856, 568 S.W.2d 3 (1978); Rogers v. Britton, 466 F. Supp. 397 (E.D. Ark. 1979); Parks v. State, 11 Ark. App. 238, 669 S.W.2d 496 (1984); Standridge v. State, 290 Ark. 150, 717 S.W.2d 795 (1986); Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988); Goff v. State, 341 Ark. 567, 19 S.W.3d 579 (2000).

16-90-107. Fixing of punishment generally.

(a) When a jury finds a verdict of guilty and fails to agree on the punishment to be inflicted, or does not declare the punishment in its verdict, or if it assesses a punishment not authorized by law, and in all

cases of a judgment on confession, the court shall assess and declare the punishment and render judgment accordingly.

(b)(1) Juries and courts shall have the power to assess the punishment of one convicted of a felony at a general sentence to the penitentiary. The sentence shall not be less than the minimum nor greater than the maximum time provided by law.

(2) At any time after the expiration of the minimum time, upon the recommendation of the superintendent and it appearing that a prisoner has a good record as a convict, his or her sentence may be terminated by the board.

(c) If the jury in any case assesses a greater punishment, whether of fine or imprisonment, than the highest limit declared by law for the offense for which they convict the defendant, the court shall disregard the excess and enter judgment and pronounce sentence according to the highest limit prescribed by law in the particular case.

(d) If the jury in any case assesses a punishment, whether of fine or imprisonment, below the limit prescribed by law for offenses of which the defendant is convicted, the court shall render judgment and pronounce sentence according to the lowest limit prescribed by law in such cases.

(e) The court shall have power in all cases of conviction to reduce the extent or duration of the punishment assessed by a jury so that the punishment is not in any case reduced below the limit prescribed by law in such cases if the conviction is proper and the punishment assessed is greater than ought to be inflicted under the circumstances of the case.

History. Rev. Stat., ch. 45, §§ 176-179; Acts 1907, No. 440, § 2, p. 1174; C. & M. Dig., §§ 3204, 3230-3233; Pope's Dig., §§ 4040, 4070-4073; A.S.A. 1947, §§ 43-2306 — 43-2310.

Cross References. Applicability of the Arkansas Criminal Code, § 5-4-103.

Consequences of nonpayment of fine or costs, § 5-4-203.

Cruel and unusual punishment not to be inflicted, Ark. Const., Art. 2, § 9.

RESEARCH REFERENCES

Ark. L. Rev. Constitutional Law — Permissibility of Increased Sentence on Retrial, 24 Ark. L. Rev. 117.

Disposition of Offenders: Under Arkansas' New Criminal Code, 30 Ark. L. Rev. 222.

CASE NOTES

Analysis

Constitutionality.
In general.
Discretion of court.
Excessive verdict.
Fixing by court.
Jurisdiction.
Modification of sentence.
Parole.

Constitutionality.

Statutes permitting the court to fix the punishment under certain circumstances are not unconstitutional. Froman v. State, 232 Ark. 697, 339 S.W.2d 601 (1960).

In General.

Subsection (b) contemplates that sentence imposed shall be executed, unless the verdict is set aside. Holden v. State, 156 Ark. 521, 247 S.W. 768 (1923).

Discretion of Court.

It is within the trial judge's discretion to set the punishment for a defendant anywhere within the statutory range of punishment provided for a particular crime. Noland v. State, 265 Ark. 764, 580 S.W.2d 953 (1979); Adams v. State, 25 Ark. App. 212, 755 S.W.2d 579 (1988).

Where, after the defendant entered a guilty plea to class C felony theft of property for which the maximum sentence is 10 years, a sentence of 6 years in prison with 2 years suspended on condition that defendant pay the sum of $135,000 at the rate of $200.00 per month, beginning 60 days after release from prison and continuing for 12 years, at which time a civil judgment would be entered for the outstanding balance, was not proper. Brimer v. State, 295 Ark. 20, 746 S.W.2d 370 (1988).

Excessive Verdict.

Where the jury imposes a fine in excess of that provided by law, the court should disregard the excess; on appeal, the judgment will be modified by striking out that portion assessing the excessive fine and affirmed. Russell v. State, 112 Ark. 282, 166 S.W. 540 (1914).

Instruction authorizing jury to fix punishment at both fine and imprisonment was held erroneous, but the error could be corrected by eliminating from judgment that part sentencing defendant to imprisonment. Craig v. State, 204 Ark. 798, 164 S.W.2d 1007 (1942).

Fixing by Court.

Court did not err in submitting to the jury a verdict form authorizing the jury to find defendant guilty without agreement of punishment, leaving the punishment to be fixed by the court, along with forms allowing the jury to find the defendant not guilty or guilty with punishment fixed by them. Downs v. State, 231 Ark. 466, 330 S.W.2d 281 (1959).

Court held authorized to fix punishment. Froman v. State, 232 Ark. 697, 339 S.W.2d 601 (1960); Norton v. State, 260 Ark. 412, 540 S.W.2d 588 (1976); Clinkscale v. State, 13 Ark. App. 149, 680 S.W.2d 728 (1984).

Jury should not be told initially that they can let the court impose the punishment, but rather, they should only be told after they report that they have reached a verdict of guilty but are unable to agree on the punishment to be imposed. Ward v. State, 236 Ark. 878, 370 S.W.2d 425 (1963). But see Underwood v. State, 205 Ark. 864, 171 S.W.2d 304 (1943).

Instruction that sentencing could be left to court held proper. Knighten v. State, 210 Ark. 248, 195 S.W.2d 47 (1946); Keese v. State, 223 Ark. 261, 265 S.W.2d 542 (1954); Ward v. State, 236 Ark. 878, 370 S.W.2d 425 (1963).

Where the circumstances indicated that the jury had reached a verdict as to defendant's guilt, it was not error for the court, upon inquiry by the jury, to permit them to return for instruction by the court as to whether, if they were unable to agree upon punishment, they could let the court fix the punishment. Burford v. State, 242 Ark. 377, 413 S.W.2d 670 (1967).

Where the instruction was given as to the fixing of punishment by the trial court at a time prior to a finding of guilty by the jury, and the counsel made the timely objection, such instruction constituted reversible error. Weems v. State, 259 Ark. 532, 534 S.W.2d 753 (1976).

Trial court's sentencing held proper. Scherrer v. State, 294 Ark. 227, 742 S.W.2d 877 (1988).

Instructing the jury prior to a finding of guilty by the jury that they can let the court impose the punishment if they reach a verdict of guilty but are unable to agree on the punishment to be imposed is reversible error. Jones v. State, 318 Ark. 704, 889 S.W.2d 706 (1994).

The court properly imposed sentence on the defendant where one juror became ill after the jury rendered a guilty verdict and could not continue. Ashlock v. State, 64 Ark. App. 253, 983 S.W.2d 448 (1998).

Where the verdict form submitted by the jury the second time was proper, the trial court erred in taking the case from the jury based on the fact that the jury had recommended a sentence of "zero" for the Class D felony. Slaughter v. State, 69 Ark. App. 65, 12 S.W.3d 240 (2000).

Where the jury convicted defendant of possession of cocaine with intent to deliver and recommended a sentence of 3 years' probation, the trial court was permitted to sentence defendant to 20 years' imprisonment rather than follow the jury's recommendation; the jury's recommendation of 3 years' probation was not authorized by § 5-64-401(a)(1), which re-

quired a minimum sentence of 20 years. Ewings v. State, 85 Ark. App. 411, 155 S.W.3d 715 (2004).

Jurisdiction.

Municipal court was not exercising its criminal jurisdiction when it found defendant guilty of criminal offenses and ordered him to pay restitution. Townsend v. State, 292 Ark. 157, 728 S.W.2d 516 (1987).

Modification of Sentence.

Subsection (c) held inapplicable. Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969).

Sentence reduced from death to life imprisonment pursuant to subsection (c). Graham v. State, 253 Ark. 462, 486 S.W.2d 678 (1972), aff'd, 254 Ark. 741, 495 S.W.2d 864 (1973); O'Neal v. State, 253 Ark. 574, 487 S.W.2d 618 (1972); Kuehn v. State, 253 Ark. 889, 489 S.W.2d 505 (1973).

Trial court was incorrect in holding subsection (c) applicable where the error in the classification of the crime by the trial court applied to both minimum and maximum penalties under the law and penalty was reduced to minimum prescribed by law. Estes v. State, 258 Ark. 597, 528 S.W.2d 138 (1975).

After defendant's valid sentence had been put into execution and an appeal was taken to the Supreme Court, the trial court was without jurisdiction to modify, amend or revise it, either during or after the term at which it was pronounced. Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979).

Where there was no evidence that the jury's sentence was based on passion or prejudice, court refused to reduce it. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Where jury assessed punishment below minimum limit prescribed by law, subsection (d) required the trial judge to pronounce a sentence according to the lowest limit prescribed by law. Caldwell v. State, 268 Ark. 713, 595 S.W.2d 253 (Ct. App. 1980).

Where the judge said nothing about balancing the fine and imprisonment elements of the sentence when he reduced the fine and illegally increased the sentence under § 5-4-103, the appellate court had no reason to reverse the fine portion of the sentence. Richards v. State, 309 Ark. 133, 827 S.W.2d 155 (1992).

Request for leniency of sentence under subsection (e) was not considered where defendant did not show that the outcome of his trial would have been different had his counsel requested consideration of the sentences received by the others who were involved in the crime of which he was convicted. Riggins v. State, 329 Ark. 171, 946 S.W.2d 691 (1997).

Trial court's power under subsection (e) of this section to reduce the punishment assessed by the jury is harmonious with, and complementary to, the jury's power to fix punishment found in §§ 5-4-103 and 16-97-101. Thomas v. State, 349 Ark. 447, 79 S.W.3d 347 (2002).

Parole.

Neither the trial court nor counsel should comment on parole because the jury would be inclined to impose excessive punishment in order to compensate for early release. Haynes v. State, 311 Ark. 651, 846 S.W.2d 179 (1993).

Cited: Martin v. State, 162 Ark. 282, 257 S.W. 752 (1924); McGee v. State, 215 Ark. 795, 223 S.W.2d 603 (1949); Newsom v. State, 232 Ark. 405, 337 S.W.2d 866 (1960); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968); Davis v. State, 246 Ark. 838, 440 S.W.2d 244 (1969); Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969); Maxwell v. Bishop, 398 U.S. 262, 90 S. Ct. 1578, 26 L. Ed. 2d 221 (1970); Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977); Rogers v. Britton, 466 F. Supp. 397 (E.D. Ark. 1979); Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988); Walker v. State, 309 Ark. 23, 827 S.W.2d 637 (1992); Brown v. State, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

16-90-108. Fixing of punishment — Misdemeanor.

(a) Whenever any person shall be convicted of a misdemeanor and the punishment for the offense is a fine, the judgment shall direct that the defendant be imprisoned until the fine and costs are paid.

(b)(1) The person so convicted shall be incarcerated for a period not to exceed one (1) day for each two dollars ($2.00) of the fine and costs.

(2) Where the laws of this state permit any fine so imposed to be discharged by a person through manual labor upon state, city, or municipal facilities, the fine shall be discharged at a rate not to exceed one (1) day of labor for each five dollars ($5.00) of the fine and cost.

(c) Nothing in this section shall be construed to limit or restrict the authority of any court to suspend any sentence upon such conditions as the court may impose.

History. Acts 1969, No. 156, § 1; A.S.A. 1947, § 43-2314.1.

Publisher's Notes. Subsection (b) of this section may be affected by § 5-4-203.

Cross References. Confinement for default, § 16-90-407.

CASE NOTES

Analysis

Applicability.
Indigents.

Applicability.

The word "imprisonment," as used in former similar section, meant imprisonment in the county jail and applied only to misdemeanors. Cheaney v. State, 30 Ark. 74 (1875); Burrele v. State, 203 Ark. 1124, 160 S.W.2d 218 (1942) (preceding decisions under prior law).

Indigents.

Requiring an indigent to serve out fine increased the severity of the penalty so that due process of law required that he be offered counsel before trial. Winters v. Beck, 281 F. Supp. 793 (E.D. Ark. 1968), aff'd, 407 F.2d 125 (8th Cir.), cert. denied, 395 U.S. 963, 89 S. Ct. 2104, 23 L. Ed. 2d 749 (1969) (decision under prior law).

Where an indigent brought habeas corpus proceeding for release from jail when imprisoned for inability to pay fine, there were alternatives to the unconditional release of the prisoner, such as probation or suspended sentence to permit installment payments of the fine. Cherry v. Hall, 251 Ark. 305, 472 S.W.2d 225 (1971).

16-90-109. Fixing of punishment — Conviction of two or more offenses.

(a) If the defendant is convicted of two (2) or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one (1) case shall commence after the termination of it in the others.

(b) When any person is convicted of more than one (1) offense, regardless if all of the convictions are in the same court or if one (1) of the convictions is in a different court of the state, a court of another state, or a federal court, where the punishment for a conviction begins before the expiration of the sentence imposed on the other conviction, the sentencing court shall have the authority to direct that the sentence adjudged shall run concurrently with the other sentence if it shall be deemed best for society and the person convicted.

History. Crim. Code, § 283; C. & M. Dig., § 3239; Acts 1923, No. 152, § 1; Pope's Dig., § 4056; Acts 1971, No. 193, § 1; A.S.A. 1947, §§ 43-2311, 43-2312.

Cross References. Multiple sentences, § 5-4-403.

RESEARCH REFERENCES

Ark. L. Rev. Criminal Law — Multiple Punishment Resulting From a Single Course of Criminal Conduct, 25 Ark. L. Rev. 181.

CASE NOTES

Analysis

Concurrent sentences.
Consecutive sentences.

Concurrent Sentences.

The authority and discretion granted by subsection (b) is vested in the trial court alone. Hayes v. State, 169 Ark. 883, 277 S.W. 36 (1925).

Unless the judgment specifically directs that one sentence shall commence upon the expiration of the other, the sentences will run concurrently. Williams v. State, 229 Ark. 42, 313 S.W.2d 242 (1958).

Findings of the jury, in fixing the punishment, that the sentences should be serve consecutively can only be considered advisory inasmuch as the question of whether sentences shall be served consecutively or concurrently lies solely within the province of the court. Higgins v. State, 235 Ark. 153, 357 S.W.2d 499 (1962).

Prior to the passage of § 16-93-601, a prisoner committed to serve two sentences was required to completely serve one of the sentences prior to the other before becoming eligible for parole. Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969).

It was not error to refuse to instruct the jury as to whether sentences on several counts would run concurrently or consecutively. Tucker v. State, 248 Ark. 979, 455 S.W.2d 888 (1970).

Consecutive Sentences.

If the judgment did not direct that the imprisonment in one case commence after the termination of it in the other, the terms of imprisonment ran concurrently, but the rule did not apply if the judgments were pronounced for fines only and the defendant was subsequently imprisoned for nonpayment of the fines. Ex parte Brady, 70 Ark. 376, 68 S.W. 34 (1902) (decision under prior law).

Courts may direct that the term of confinement shall begin at the expiration of a previous term. Hayes v. State, 169 Ark. 883, 277 S.W. 36 (1925).

Though the court had the power to correct clerical errors in its judgments, orders or decrees, the order could not be corrected to read that the sentence was to begin at the expiration of the sentence defendant was at present serving, it being construed that the commitment would run concurrently. Williams v. State, 229 Ark. 42, 313 S.W.2d 242 (1958).

Where a defendant was sentenced to the penitentiary for 21 years for robbery and 7 years for burglary, the terms to run consecutively, the 21 years for robbery should be served first. Rowe v. State, 243 Ark. 375, 419 S.W.2d 806 (1967).

Where the defendant was convicted and sentenced for two offenses in state court, but before he was confined was tried on a federal charge and imprisoned in a federal penitentiary, his state sentence started running on the date he was delivered to the state penitentiary to start serving his sentence. Young v. State, 252 Ark. 184, 477 S.W.2d 823 (1972).

Trial court did not abuse its discretion in ordering the sentences to run consecutively. Graham v. State, 254 Ark. 741, 495 S.W.2d 864 (1973); Shields v. State, 281 Ark. 420, 664 S.W.2d 866 (1984); Edwards v. State, 300 Ark. 4, 775 S.W.2d 900 (1989).

A trial court has the discretion to make maximum sentences run consecutively if it is in the best interests of society and the person convicted and his exercise of discretion will not be reversed unless it is shown that he abused that discretion. Hinton v. State, 260 Ark. 42, 537 S.W.2d 800 (1976); Blair v. State, 284 Ark. 330, 681 S.W.2d 374 (1984).

Under this section, the trial court clearly has authority to order that sentences be served consecutively. Love v. State, 324 Ark. 526, 922 S.W.2d 701 (1996).

Cited: Rowe v. State, 243 Ark. 375, 419 S.W.2d 806 (1967); Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969); Jackson v. State, 254 Ark. 246, 492 S.W.2d 897 (1973); Klimas v. State, 271 Ark. 508, 609

S.W.2d 46 (1980); Matthews v. Lockhart, 726 F.2d 394 (8th Cir. 1984); Harper v. State, 315 Ark. 195, 865 S.W.2d 647 (1993).

16-90-110. Fixing of punishment — Judgment of death.

Where judgment of death is pronounced, the day of the execution shall be fixed in the judgment. The day of execution shall not be in less than thirty (30) days after the judgment.

History. Crim. Code, § 285; C. & M. Dig., § 3238; Pope's Dig., § 4078; A.S.A. 1947, § 43-2313.

Cross References. Automatic appeal and mandatory review in death sentence case; procedure on affirmance, RAP-Crim 10.

16-90-111. [Superseded.]

Publisher's Notes. This section, concerning correction or reduction of sentences, was declared superseded by ARCrP 37.2(c) in Harris v. State, 318 Ark. 599, 887 S.W. 2d 514 (1994). The section was derived from Acts 1983, No. 431, § 1; A.S.A. 1947, § 43-2314; Acts 1987, No. 550, § 1; 1999, No. 578, § 1.

By Per Curiam order dated December 19, 1994, the Supreme Court provided: "This court frequently acts on motions filed in the course of appeals of orders denying post-conviction relief pursuant to Arkansas Criminal Procedure Rule 37, Ark. Code Ann. § 16-90-111 (Supp. 1991), statutes which govern the issuance of writs of habeas corpus and mandamus as well as legal remedies such as error coram nobis proceedings and others. As there is no provision in the prevailing rules of procedure for a motion for reconsideration to be filed after this court has denied a motion which stems from a post-conviction matter, such motions will no longer be filed."

16-90-112. Fixing of punishment — Removal from certain offices — Exclusion of suffrage.

(a) Where judges of the probate court, justices of the peace, sheriffs, coroners, surveyors, jailers, county assessors, prosecuting attorneys, constables, city or police judges, clerks, and marshals shall be convicted upon an indictment for malfeasance or misfeasance in office, for willful neglect in the discharge of their official duties, or for any offense which by statute law or the Arkansas Constitution creates a forfeiture of their offices, the court shall render a judgment of removal from office in addition to the other penalties and punishment prescribed by law.

(b) Every person convicted of bribery or felony shall be excluded from every office of trust or profit and from the right of suffrage in this state.

History. Rev. Stat., ch. 44, div. 4, art. 11, § 8; Crim. Code, § 287; C. & M. Dig., §§ 3246, 3247; Pope's Dig., §§ 4091, 4092; A.S.A. 1947, §§ 43-2318, 43-2319.

Cross References. Persons entitled to vote, Ark. Const., Art. 3, §§ 1-7, Amend. No. 8.

RESEARCH REFERENCES

Ark. L. Rev. Official Misconduct under the Arkansas Criminal Code, 30 Ark. L. Rev. 160.

Wills, Constitutional Crisis: Can the Governor (or Other State Officeholder) Be Removed from Office in a Court Action

after Being Convicted of a Felony?, 50 Ark. L. Rev. 221.

CASE NOTES

Suspension Pending Trial.

Legislature is without power to authorize the circuit court to suspend from office a prosecuting attorney who is under indictment. Speer v. Wood, 128 Ark. 183, 193 S.W. 785 (1917).

Cited: Campbell v. State, 300 Ark. 570, 781 S.W.2d 14 (1989).

16-90-113. Fixing of punishment — Judgment for costs.

(a) In judgments against the defendant, a judgment for costs shall be rendered in addition to the other punishment. This judgment shall be taxed by the clerk and shall be for the benefit of the officers rendering the service.

(b) In case of failure by the defendant to pay the costs, they shall be paid by the county where the conviction is had.

History. Crim. Code, § 286; Acts 1871, No. 49, § 1 [286], p. 255; C. & M. Dig., § 3243; Pope's Dig., § 4083; A.S.A. 1947, § 43-2316.

CASE NOTES

Analysis

Correction of error.
Misdemeanor cases.
Prosecuting attorney's fee.

Correction of Error.

An omission from the judgment of a provision that defendant shall pay the costs may be cured by nunc pro tunc entry. Villines v. State, 105 Ark. 471, 151 S.W. 1023 (1912).

Misdemeanor Cases.

In case of misdemeanor, when the defendant is convicted, the county is not liable for the costs. Bradley County v. Bond, 37 Ark. 226 (1881).

Prosecuting Attorney's Fee.

Costs include the prosecuting attorney's fee. Phillips County v. Clayton, 29 Ark. 246 (1874).

County is not liable for the fees of the prosecuting attorney in cases of convictions for misdemeanors where the defendant has no property and the county has not contracted to work its convicts. Lonoke County v. Reed, 122 Ark. 111, 182 S.W. 563 (1916).

Prosecuting attorney's fee is not taxable until final judgment has been rendered. Huddleston v. Craighead County, 128 Ark. 287, 194 S.W. 17 (1917).

16-90-114. Postponement of sentence.

(a) In any case where the pronouncement of final judgment and sentence shall have been postponed, all costs shall be considered due and payable just as if the sentence and judgment had been pronounced.

(b) It is the intention of this section that the postponement, so far as liability for costs is concerned, shall be regarded as a conviction.

History. Acts 1923, No. 76, § 3; Pope's Dig., § 4055; A.S.A. 1947, § 43-2325.

Cross References. Effect on appeal, § 5-4-305.

16-90-115. Suspension of sentence.

(a) All courts of record, district courts, and city courts in this state shall have the authority to suspend the imposition of sentences or the imposition of fines, or both, in all criminal cases pending before the courts unless specifically prohibited by law.

(b)(1) At any time before a court has entered a judgment of conviction against a criminal defendant, the court may dismiss the case and, in that instance, any fine imposed against the defendant shall be considered a civil penalty.

(2) The court, however, shall assess and disburse the appropriate court costs pursuant to § 16-10-305 et seq.

History. Acts 1999, No. 463, § 1; 2003, No. 1185, §§ 215, 216.

Publisher's Notes. Former § 16-90-115, concerning suspension of sentence, was repealed by Acts 1997, No. 788, § 32 and No. 1341, § 31. The section was derived from Acts 1985, No. 956, §§ 1-3; A.S.A. 1947, §§ 43-2326.1 — 43-2326.3.

Amendments. The 2003 amendment by No. 1185, § 215 substituted "district courts, city courts, and police courts" for "municipal courts, city courts, corporation courts, mayor's courts, police courts, justice of the peace courts, and courts of common pleas" in (a).

The 2003 amendment by No. 1185, § 216, substituted "and city courts" for "city courts, and police courts" in (a).

16-90-116. Taking of bond or note for misdemeanor fine and costs.

(a) Whenever any person is convicted of a misdemeanor by any court or justice of the peace and gives security for the fine and costs adjudged against him, the sheriff or other officer taking the security shall forthwith file the bond or note so taken with the clerk of the court or justice of the peace rendering the judgment.

(b)(1) The bond or note, when so filed, shall have the force and effect of a judgment. If the bond or note is not satisfied at maturity, the clerk of the court or the justice of the peace, as the case may be, shall issue an execution against the defendant and the securities. The execution so issued shall have the same force and effect as other executions in criminal cases.

(2) If the clerk of the court or justice of the peace shall fail or refuse to issue execution as provided in this subsection within sixty (60) days after maturity of the bond or note, he or she shall be liable to indictment for a misdemeanor and upon conviction shall be fined in any sum not less than the amount of the judgments.

History. Acts 1887, No. 148, § 1, p. 274; 1897, No. 37, § 1, p. 47; C. & M. Dig., §§ 3278, 7560; Pope's Dig., §§ 4126, 9634; A.S.A. 1947, § 43-2317.

CASE NOTES

Analysis

Default in payment.
Installment payment.
Right to appeal.

Default in Payment.

Where security is given under this sec-

tion, and defendant released by virtue thereof, and default is made in the payment at maturity of the note and a nulla bona return made, the defendant cannot be retaken on the judgment. State v. Pigguese, 58 Ark. 132, 23 S.W. 792 (1893).

Installment Payment.

The authority of the sheriff to accept a note or bond for the payment of a fine and costs could have been utilized to provide an installment payment system for those whose payments were secured by solvent surety. Cherry v. Hall, 251 Ark. 305, 472 S.W.2d 225 (1971).

Right to Appeal.

A judgment defendant does not waive the right to appeal by executing a note and mortgage to the state to secure the payment of the judgment. Hubbard v. State, 71 Ark. 467, 75 S.W. 853 (1903).

16-90-117. Security to keep the peace or be of good behavior.

(a) The court before which any person may be convicted of any criminal offense not punishable by death shall have power, in addition to the sentence prescribed or authorized by law, to require the person to give security to keep the peace or be of good behavior, or both, for any term not exceeding three (3) years from the time he or she may be discharged from prison if imprisonment is a part of the punishment.

(b) If the person fails to give security as required in subsection (a) of this section, he or she shall be committed to prison, there to remain until the security is given.

(c) No recognizance given under the provisions of subsection (a) of this section shall be deemed to be broken unless the principal therein is convicted of some offense amounting in judgment of law to a breach of the recognizance.

History. Rev. Stat., ch. 45, §§ 180-182; C. & M. Dig., §§ 3248, 3249; Pope's Dig., §§ 4093, 4094; A.S.A. 1947, §§ 43-2320 — 43-2322.

RESEARCH REFERENCES

Ark. L. Rev. Killenbeck, Nothing That We Can Do? Or, Much Ado About Nothing? Some Thoughts on Bates v. Bates, Equity, and Domestic Abuse in Arkansas, 43 Ark. L. Rev. 766.

16-90-118. Duty of court to report to penitentiary.

(a) Whenever any person is sentenced to the penitentiary, it shall be the duty of the court before which he or she has been convicted to cause to be made and transmitted to the agent of the penitentiary a short report of the circumstances attending the offense, particularly those which tended to aggravate or extenuate the offense.

(b) The agent shall file and preserve the report.

History. Acts 1838, § 11, p. 116; C. & M. Dig., § 3242; Pope's Dig., § 4082; A.S.A. 1947, § 43-2323.

CASE NOTES

Commitment Before Sentence.
Neither judges nor courts have authority to order persons accused of crimes, before conviction, to the penitentiary for safe-keeping. Martin v. State, 162 Ark. 282, 257 S.W. 752 (1924).

16-90-119. Confiscation of deadly weapons.

(a) When any person is convicted of any homicide, burglary, robbery, assault with intent to kill, assault with a deadly weapon, battery, or any other felony involving a deadly weapon, the court in which the person is convicted may confiscate the deadly weapons involved in the offense and may by court order either:

(1) Transfer the weapons and the title to the weapons to an appropriate state or local law enforcement agency for use or sale by the law enforcement agency; or

(2) Order the weapons destroyed if the weapons are not suitable for use or sale by law enforcement agencies.

(b)(1) The sale of weapons by a law enforcement agency under this section shall be at a public auction or by competitive bid.

(2) The sale shall be subject to a background check of the purchaser through the Federal Bureau of Investigation's National Instant Criminal Background Check System.

(3) The sale shall not include illegal weapons.

(4) The proceeds of the auction shall be retained by the law enforcement agency.

History. Acts 1953, No. 267, § 1; A.S.A. 1947, § 43-2327; Acts 1987, No. 712, § 1; 2005, No. 889, § 1.

Amendments. The 2005 amendment inserted the present subdivision (a), (a)(1) and (a)(2) designations and made related changes; inserted "for use or sale by the law enforcement agency" in present (a)(1); in present (a)(2), inserted "or sale" and deleted "may" preceding "order"; and added (b).

U.S. Code. As to the Federal Bureau of Investigation's National Instant Criminal Background Check System, referred to in (b)(2), see Section 103 of the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922nt.

16-90-120. Felony with firearm.

(a) Any person convicted of any offense which is classified by the laws of this state as a felony who employed any firearm of any character as a means of committing or escaping from the felony, in the discretion of the sentencing court, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen (15) years.

(b) The period of confinement, if any, imposed pursuant to this section shall be in addition to any fine or penalty provided by law as punishment for the felony itself. Any additional prison sentence imposed under the provisions of this section, if any, shall run consecutively and not concurrently with any period of confinement imposed for conviction of the felony itself.

(c) A separate appeal may be taken to the Arkansas Supreme Court from the imposition of the sentence, if any, provided for by this section, and any appeal shall be in the manner prescribed for appellate review of conviction of criminal offenses in general. However, the sole and only question to be decided upon the separate appeal shall be whether the evidence warrants a finding that the defendant actually employed a firearm in the commission of, or escape from commission of, the felony for which he or she stands convicted.

(d) Any reversal of a defendant's conviction for the commission of the felony shall automatically reverse the prison sentence which may be imposed under this section.

History. Acts 1969, No. 78, §§ 1-3; 1973, No. 61, § 1; A.S.A. 1947, §§ 43-2336 — 43-2338.

RESEARCH REFERENCES

Ark. L. Rev. Notes, Shockley v. State: The Constitutionality of the Arkansas Habitual Offender Determination Procedure, 39 Ark. L. Rev. 553.

CASE NOTES

Analysis

Constitutionality.
In general.
Additional confinement.
Appeal.
Construction with other laws.
Indictment.

Constitutionality.

Use of the words "sentencing court" in this section was intended by the legislature to refer either to the judge or the jury, and the factual issue of the use of a firearm is to be determined by the jury unless a jury has been waived; therefore, the statute does not contravene the constitutional right to a trial by jury. Redding v. State, 254 Ark. 317, 493 S.W.2d 116 (1973).

There was no justification in the argument that this section is vague and indefinite where the argument was unsupported by citation of precedent and defendants did not more than give citations to court decisions which were alleged as illustrative of the confusion. Barnes v. State, 258 Ark. 565, 528 S.W.2d 370 (1975).

Legislature held justified in specifying an additional penalty for those felonies committed by means of firearms; thus, this section was not an unconstitutional denial of equal protection of law even though a similar enhanced punishment was not imposed for commission of homicide by other means. Rawls v. State, 260 Ark. 430, 541 S.W.2d 298 (1976).

In General.

If a deadly weapon used by a felon is a firearm, the sentencing court has the discretion pursuant to the statute to impose a period of confinement not to exceed 15 years, which period would be in addition to any fine or penalty authorized as punishment for the felony itself. Hagar v. State, 341 Ark. 633, 19 S.W.3d 16 (2000).

Where appellant was convicted of two hotel robberies, the trial court properly convicted him of aggravated robbery, rape, two counts of being a felon in possession of a firearm, and being a habitual offender where the state alleged that appellant had prior felony convictions. Townsend v. State, 355 Ark. 248, 134 S.W.3d 545 (2003).

Additional Confinement.

Addition of extra sentence by the trial court under this section violated the defendant's constitutional rights in that no specific finding was ever made by the jury to the effect that he had committed the crime while armed with a pistol. Johnson

v. State, 249 Ark. 208, 458 S.W.2d 409 (1970).

Additional confinement held improper. Cotton v. State, 256 Ark. 527, 508 S.W.2d 738 (1974).

Finding that defendant was guilty of second-degree murder and that her sentence should be lengthened by five years under this section did not constitute double jeopardy. Rawls v. State, 260 Ark. 430, 541 S.W.2d 298 (1976).

Firearm enhancements must always run after the basic sentences and cannot be affected by the concurrent running of the original sentences. Welch v. State, 269 Ark. 208, 599 S.W.2d 717, cert. denied, 449 U.S. 996, 101 S. Ct. 535, 66 L. Ed. 2d 294 (1980).

Additional confinement held proper. Haynie v. State, 257 Ark. 542, 518 S.W.2d 492 (1975); Ferguson v. State, 257 Ark. 1036, 521 S.W.2d 546 (1975); Gammel v. State, 259 Ark. 96, 531 S.W.2d 474 (1976); Holloway v. Lockhart, 754 F.2d 252 (8th Cir.), cert. denied, 474 U.S. 836, 106 S. Ct. 111, 88 L. Ed. 2d 90 (1985).

The trial court erred in enhancing the defendant's sentence because the court was not the "sentencing court" where the defendant was found guilty and sentenced by a jury. Watson v. State, 71 Ark. App. 52, 26 S.W.3d 588 (2000).

Appeal.

Where the record revealed that no objection to the information charging the defendant with the use of the firearms in the commission of a felony or to the manner of the submission of the issue to the jury was made, such issues could not be raised for the first time on appeal. Haynie v. State, 257 Ark. 542, 518 S.W.2d 492 (1975).

Construction With Other Laws.

Section 5-4-103 did not repeal this section; the statutes speak to two different issues and can be read in harmony. Watson v. State, 71 Ark. App. 52, 26 S.W.3d 588 (2000).

Upon conviction for aggravated robbery and misdemeanor theft of property, defendant's enhanced sentence as a habitual offender with two prior felony convictions was affirmed as there was no conflict between § 5-4-104(a) and subsections (a) and (b) of this section; § 5-4-104(a) refers only to the initial sentence and subsections (a) and (b) refer only to a sentence enhancement that could be added to the initial sentence. Williams v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 724 (Nov. 17, 2005).

Indictment.

Court's failure to separately indicate the period of confinement for the felony conviction and the term of confinement under this section did not constitute reversible error. Norton v. State, 260 Ark. 412, 540 S.W.2d 588 (1976).

Cited: Johnson v. State, 249 Ark. 208, 458 S.W.2d 409 (1970); Roach v. State, 255 Ark. 773, 503 S.W.2d 467 (1973); Haynie v. State, 257 Ark. 542, 518 S.W.2d 492 (1975); Lisenby v. State, 260 Ark. 585, 543 S.W.2d 30 (1976); Walters v. State, 267 Ark. 155, 621 S.W.2d 468 (1979); Witherspoon v. State, 319 Ark. 313, 891 S.W.2d 371 (1995).

16-90-121. Second or subsequent felony with firearm.

Any person who is found guilty of or pleads guilty or nolo contendere to a second or subsequent felony involving the use of a firearm shall be sentenced to a minimum term of imprisonment of ten (10) years in the state prison without eligibility of parole or community punishment transfer but subject to reduction by meritorious good-time credit.

History. Acts 1981, No. 583, § 1; A.S.A. 1947, § 43-2336.1; Acts 2001, No. 1783, § 1.

Amendments. The 2001 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

CASE NOTES

Analysis

In general.
Cumulative punishment.
Double jeopardy.
Sentence proper.
Verdict forms.

In General.

If a defendant is found guilty of a felony involving the use of a deadly weapon, including but not limited to a firearm, that defendant must be sentenced to serve a minimum of 10 years in the state prison; according to the plain language of the statute, the use of a deadly weapon need not be an element of the crime. Hagar v. State, 341 Ark. 633, 19 S.W.3d 16 (2000).

Cumulative Punishment.

If the general assembly specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct, the trial court may impose cumulative punishment in a single trial. Jernigan v. State, 38 Ark. App. 102, 828 S.W.2d 864 (1992).

When two punishment statutes exist, a court is not prevented from using the more stringent provision. Jernigan v. State, 38 Ark. App. 102, 828 S.W.2d 864 (1992).

Double Jeopardy.

Aggravated robbery is not already an "enhancement provision" applied to robbery and imposed for the use of a deadly weapon, so "enhancement" under this section for the same use of the same deadly weapon does not subject a defendant to "double jeopardy." Crespo v. State, 30 Ark. App. 12, 780 S.W.2d 592 (1989).

Sentence Proper.

A defendant in a prosecution for manslaughter was properly sentenced to 10 years' imprisonment where the jury found that she used a "firearm" in the commission of the crime, notwithstanding the jury's recommendation that she be sentenced to five years's probation and a $5,000 fine. Hagar v. State, 341 Ark. 633, 19 S.W.3d 16 (2000).

Verdict Forms.

Trial court did not err in submitting modified verdict forms to the jury which allowed the jury the additional choice of whether the crime was committed with a deadly weapon. Wilson v. State, 282 Ark. 551, 669 S.W.2d 889 (1984).

16-90-122. Post-conviction release of nonviolent offenders.

(a) Any circuit judge may authorize the temporary release of an offender in the sheriff's custody who has:

(1) Been found guilty of or pleaded guilty or nolo contendere to a nonviolent felony offense in circuit court, except nonviolent Class Y felony offenses listed in § 16-93-611; and

(2) Been sentenced to a term of imprisonment and committed to the Department of Correction or the Department of Community Correction and is awaiting transfer to the Department of Correction or the Department of Community Correction.

(b)(1) The judge may authorize the release under the terms and conditions which he or she determines are necessary to protect the public and to ensure the offender's return to custody upon notice that bed space is available at the Department of Correction or the Department of Community Correction.

(2) The judge may require a cash or professional bond to be posted in an amount suitable to ensure the offender's return to custody.

History. Acts 2005, No. 1261, § 1.

Subchapter 2 — Multiple Convictions

SECTION.
16-90-201. Punishment for second or subsequent convictions generally.
16-90-202. Punishment for third conviction for certain offenses.
16-90-203. [Superseded.]
16-90-204. Evidence of former conviction.
16-90-205. Trial procedure for habitual criminals.

Effective Dates. Acts 1953, No. 228, § 6: Mar. 6, 1953. Emergency clause provided: "It has been found and declared by the General Assembly of Arkansas that a number of persons who commit felonies have previously been convicted of felonies and are habitual criminals and that a need exists in this State to increase the punishment provided to habitual criminals and that the passage of this Act will provide for greater punishment of habitual criminals and reduce the number of persons committing more than one felony and reduce the number of crimes committed in this State. Therefore, an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

RESEARCH REFERENCES

ALR. Using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence. 37 ALR 4th 1168.

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 884 et seq.

Ark. L. Rev. Federal Habeas Corpus — Multiple Offenders and Exhaustion of Remedies, 17 Ark. L. Rev. 78.

Note, Helm v. Solem: Can a Prison Sentence Constitute Cruel and Unusual Punishment?, 36 Ark. L. Rev. 673.

C.J.S. 24 C.J.S., Crim. L., § 1638 et seq.

UALR L.J. Survey of Arkansas Law: Criminal Law, 4 UALR L.J. 189.

16-90-201. Punishment for second or subsequent convictions generally.

Any person convicted of an offense which is punishable by imprisonment in the penitentiary who shall subsequently be convicted for another offense shall be punished as follows:

(1) If the second offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his or her natural life, then the sentence to imprisonment shall be for a determinate term not less than one (1) year more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for this offense, unless the maximum sentence is less

than the minimum sentence plus one (1) year, in which case the longer term shall govern;

(2) If the third offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his or her natural life, then the person shall be sentenced to imprisonment for a determinate term not less than three (3) years more than the minimum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than the maximum sentence provided by law for the offense, unless the maximum sentence is less than the minimum sentence plus three (3) years, in which case the longer term shall govern;

(3)(A) If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term less than his or her natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than the maximum sentence provided by law for a first conviction of the offense for which the defendant is being tried, and not more than one and one-half (1½) times the maximum sentence provided by law for a first conviction.

(B) However, any person convicted of a fourth or subsequent offense shall be sentenced to imprisonment for no less than five (5) years.

History. Acts 1953, No. 228, § 1; 1967, No. 639, § 1; A.S.A. 1947, § 43-2328.

Cross References. Sentencing, § 5-4-501.

RESEARCH REFERENCES

ALR. Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction. 97 ALR 5th 293.

Ark. L. Rev. Note, Conley v. State: Mitigation Before Guilt, 45 Ark. L. Rev. 995.

CASE NOTES

Analysis

Constitutionality.
Construction.
Applicability.
Burden of proof.
Failure to invoke act.
Prior convictions.
—Assistance of counsel.
—Evidence.
Procedure generally.
—Indictment or information.
—Pleading.

Constitutionality.

Enhanced sentence held not to constitute cruel and unusual punishment. Wilson v. State, 251 Ark. 900, 475 S.W.2d 543 (1972).

The habitual criminal act is not unconstitutional on the grounds of cruel or unusual punishment. Thompson v. State, 252 Ark. 1, 477 S.W.2d 469 (1972).

Construction.

The Habitual Criminal Act is not couched in language indicative of an intention that its invocation by prosecuting officers be discretionary any more than the statutes fixing punishment for the crimes themselves. Poe v. State, 251 Ark. 35, 470 S.W.2d 818 (1971).

This section is best referred to as a sentencing enhancement provision, thus, if conviction on the "current offense" falls, then conviction as an habitual offender enhancing the sentence must fall with it.

Ellingburg v. Lockhart, 397 F. Supp. 771 (E.D. Ark. 1975).

Legislature intended the word "conviction" as used in the statute to mean the establishment of guilt prior to and independently of judgment and sentence. Rogers v. State, 260 Ark. 232, 538 S.W.2d 300 (1976).

Applicability.

Although the Habitual Criminal Act encompasses prior convictions in the federal courts and in other state courts, the statute is applicable only when both the prior and present convictions are felonies and does not convert a misdemeanor into a felony. McIlwain v. State, 226 Ark. 818, 294 S.W.2d 350 (1956).

Under the Habitual Criminal Act, prior convictions may be the basis for increasing the punishment for the offense on trial; however, in the absence of a conviction, the jury ought not to consider some other offense as a reason for increased punishment. Osborne v. State, 237 Ark. 5, 371 S.W.2d 518 (1963).

Burden of Proof.

State had the burden of establishing the number and validity of defendant's prior convictions for purposes of sentencing under the Arkansas Habitual Criminal Act. Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

Failure to Invoke Act.

Where prosecuting attorneys in one district failed to invoke the habitual criminal act, subsequent applications of the act were not denials of equal protection or due process. Poe v. State, 251 Ark. 35, 470 S.W.2d 818 (1971).

Prior Convictions.

Where accused charged with a second or subsequent offense confesses the fact of the prior conviction, it is unnecessary for the state to prove such fact. Jackson v. State, 226 Ark. 731, 293 S.W.2d 699 (1956).

Court's refusal to strike the habitual criminal charge was not error since it had a right and duty to give the state the opportunity to prove a former conviction. Clubb v. State, 230 Ark. 688, 326 S.W.2d 816 (1959).

It is error to use pardoned conviction to enhance defendant's sentence. Duncan v. State, 254 Ark. 449, 494 S.W.2d 127 (1973).

As to stipulation to prior convictions, see: Cox v. State, 257 Ark. 35, 513 S.W.2d 798 (1974); Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979); Cox v. Hutto, 619 F.2d 731 (8th Cir. 1980).

An adjudication of juvenile delinquency results in the determination of a status and not conviction for a crime. Rogers v. State, 260 Ark. 232, 538 S.W.2d 300 (1976).

—Assistance of Counsel.

Allowing jury to consider, as evidence of prior convictions, two documents which did not reflect whether the appellant was represented by or had validly waived counsel was an error which required reduction of the sentence. McConahay v. State, 257 Ark. 328, 516 S.W.2d 887 (1974).

Defendant's contention that he was not afforded counsel at the time he entered guilty pleas in the state courts was insufficient to rebut the statement in the state records that each time defendant entered guilty pleas he appeared in person and with his counsel. Clem v. Lockhart, 525 F.2d 1192 (8th Cir. 1975).

Evidence of a defendant's prior convictions for purposes of applying the habitual criminal act must establish that the defendant either received assistance from an attorney or validly waived counsel at the time of each prior conviction. Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

—Evidence.

Evidence of prior convictions sufficient to convict defendant under this section. Flurry v. State, 248 Ark. 722, 453 S.W.2d 402 (1970); Meyers v. State, 252 Ark. 367, 479 S.W.2d 238 (1972); Clem v. State, 254 Ark. 580, 495 S.W.2d 517 (1973).

As to admissibility of certain prior convictions, see: Wilburn v. State, 253 Ark. 608, 487 S.W.2d 600 (1972); Thacker v. State, 253 Ark. 864, 489 S.W.2d 500 (1973); Klimas v. State, 259 Ark. 301, 534 S.W.2d 202, cert. denied, 429 U.S. 846, 97 S. Ct. 128, 50 L. Ed. 2d 117 (1976).

Where an infirm document of a previous conviction is admitted as evidence in a proceeding under this section, the Arkansas Supreme Court will reduce the defendant's sentence. McConahay v. State, 257 Ark. 328, 516 S.W.2d 887 (1974).

Where it could not be determined what part inadmissible conviction played in the

determination of defendant's sentence under the habitual criminal act, defendant's sentence, upon showing of three admissible convictions, was reduced to minimum terms. Rogers v. State 260 Ark. 232, 538 S.W.2d 300 (1976).

A docket sheet may not be used to establish a prior conviction for purposes of sentencing under the habitual criminal statute. Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

Procedure Generally.

As to submission of the issue of punishment to the jury, see: Miller v. State, 239 Ark. 836, 394 S.W.2d 601 (1965); Cummings v. State, 239 Ark. 1027, 396 S.W.2d 298 (1965); Ridgeway v. State, 251 Ark. 157, 472 S.W.2d 108 (1971); Backus v. State, 253 Ark. 60, 484 S.W.2d 515 (1972).

Error of the trial court in permitting the state to show prior convictions of an alleged habitual criminal in its trial of the current charge cannot be raised in post-conviction procedure after the case has been finally adjudicated and the appellate process completed. Rowe v. State, 243 Ark. 375, 419 S.W.2d 806 (1967).

—Indictment or Information.

Indictment or information held sufficient to allege prior convictions. Jackson v. State, 226 Ark. 731, 293 S.W.2d 699 (1956).

That part of the indictment or information charging a previous conviction should not be read to the jury during the trial of the principal offense charged. Miller v. State, 239 Ark. 836, 394 S.W.2d 601 (1965); Cummings v. State, 239 Ark. 1027, 396 S.W.2d 298 (1965); Russell v. State, 240 Ark. 97, 398 S.W.2d 213 (1966).

Information which did not designate defendant's four previous convictions, but did state that the charges were filed under the habitual criminal statute, was not fatally defective; any lack of specificity was waived by defendant's voluntary plea of guilty. Wilson v. State, 251 Ark. 900, 475 S.W.2d 543 (1972).

—Pleading.

If the defendant pleads guilty to the previous conviction charge, the matter can be handled by the court in charging the jury in its instruction as to the minimum penalty. Miller v. State, 239 Ark. 836, 394 S.W.2d 601 (1965); Cummings v. State, 239 Ark. 1027, 396 S.W.2d 298 (1965).

Evidence was sufficient to show defendant's guilty plea was entered with sufficient understanding of its effect, even though defendant alleged that the effect of the habitual criminal statute was not explained to him. Wilson v. State, 251 Ark. 900, 475 S.W.2d 543 (1972).

While the applicability of the habitual criminal act is "charged" in the sense that the trial court is notified of it in the information filed against the accused, no plea is required. Atkins v. State, 287 Ark. 445, 701 S.W.2d 109 (1985).

Cited: Walker v. State, 240 Ark. 441, 399 S.W.2d 672 (1966); Bradshaw v. State, 250 Ark. 135, 464 S.W.2d 614 (1971); Brown v. State, 252 Ark. 846, 481 S.W.2d 366 (1972); Polk v. State, 252 Ark. 320, 478 S.W.2d 738 (1972); Ellingburg v. State, 254 Ark. 199, 492 S.W.2d 904 (1973); Cox v. State, 255 Ark. 204, 499 S.W.2d 630 (1973); Roach v. State, 255 Ark. 773, 503 S.W.2d 467 (1973); Bumgarner v. Lockhart, 361 F. Supp. 829 (E.D. Ark. 1973); Moore v. State, 256 Ark. 385, 507 S.W.2d 711 (1974); Alexander v. State, 256 Ark. 700, 509 S.W.2d 816 (1974); Yarbrough v. State, 257 Ark. 732, 520 S.W.2d 227 (1975); Johnson v. State, 259 Ark. 220, 532 S.W.2d 1 (1976); Cary v. State, 259 Ark. 510, 534 S.W.2d 230 (1976); Dixon v. State, 260 Ark. 857, 545 S.W.2d 606 (1977); Young v. Mabry, 471 F. Supp. 553 (E.D. Ark. 1978); Young v. Mabry, 596 F.2d 339 (8th Cir. 1979); Blackmon v. State, 272 Ark. 157, 612 S.W.2d 319 (1981); Christian v. Housewright, 721 F.2d 240 (8th Cir. 1983); Woods v. State, 302 Ark. 512, 790 S.W.2d 892 (1990).

16-90-202. Punishment for third conviction for certain offenses.

(a) When any person shall be convicted of murder, rape, carnal abuse, or kidnapping and it shall be shown that the person has been twice previously convicted of any of the above-mentioned crimes in this state or any other state, upon the third conviction the person shall be

deemed an habitual criminal and shall be sentenced to life imprisonment in the state penitentiary.

(b) However, nothing in this section shall be construed to abolish or otherwise affect punishment by death for crimes which are punishable by death.

History. Acts 1967, No. 212, § 1; A.S.A. 1947, § 43-2328.1.

Publisher's Notes. This section may have been repealed by later legislation which enacted § 5-4-104(a). See Hodge v. State, 320 Ark. 31, 894 S.W.2d 927 (1995).

CASE NOTES

Supersession of Statute.

This section may have been repealed by § 5-4-104(a). Hodge v. State, 320 Ark. 31, 894 S.W.2d 927 (1995).

16-90-203. [Superseded.]

Publisher's Notes. This section was derived from Acts 1953, No. 228, § 2; A.S.A. 1947, § 43-2329.

This section was held to be superseded by § 5-4-503 in McGirt v. State, 289 Ark. 7, 708 S.W.2d 620 (1986).

16-90-204. Evidence of former conviction.

The duly certified copy of the record of a former conviction and judgment of any court of record for imprisonment in the penitentiary against the person indicated or the certificate of the warden or other chief officer of any penitentiary of this state or any other state in the United States, of the federal government, of any foreign country, or of the chief custodian of the records of the United States Department of Justice containing the name and the fingerprints of the person imprisoned as they appear in the records of his or her office shall be prima facie evidence, upon the trial of any person for a second and subsequent offense, of the conviction and judgment of imprisonment in the penitentiary and may be used in evidence against the person.

History. Acts 1953, No. 228, § 3; 1961, No. 95, § 1; A.S.A. 1947, § 43-2330.

Cross References. Proof of previous conviction, § 5-4-504.

CASE NOTES

Analysis

Construction.
Applicability.
Presumption.
Proof.
—Records.
—Sufficiency of evidence.

Construction.

Since the habitual criminal act authorizing a more severe punishment for one who has been previously convicted is highly penal, it must be strictly construed. Higgins v. State, 235 Ark. 153, 357 S.W.2d 499 (1962).

Applicability.

Although the habitual criminal act encompasses prior convictions in the federal courts and in other state courts, the statute is applicable only when both prior and present convictions are felonies, and it does not convert a misdemeanor into a felony. McIlwain v. State, 226 Ark. 818, 294 S.W.2d 350 (1956).

Presumption.

Where the court's seal of which the clerk

is custodian is affixed to document showing previous convictions, it will be presumed that the person who signed the name of the clerk as deputy is a deputy clerk in absence of evidence to the contrary. Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975).

Proof.

Where an information charges a defendant is a habitual criminal, the introduction of evidence of other crimes is not error although the defendant is not convicted under the habitual criminal charge. Rowe v. State, 224 Ark. 671, 275 S.W.2d 887 (1955).

Pre-Gideon conviction would be suppressed in determination of habitual offender status only if defendant raised lack of counsel, confused identity or other constitutional infirmities from earlier conviction at trial on habitual offender status rather than waiting until appeal. Fike v. State, 255 Ark. 956, 504 S.W.2d 363 (1974).

Nothing in this section prevents proof of prior convictions by other admissible evidence. Parker v. State, 258 Ark. 880, 529 S.W.2d 860 (1975).

Properly certified copies of certain documents are prima facie evidence of prior convictions, but other methods of proof of prior convictions are not excluded. Parker v. State, 258 Ark. 880, 529 S.W.2d 860 (1975); Cary v. State, 259 Ark. 510, 534 S.W.2d 230 (1976).

—Records.

It was not the intent of the legislature to permit introduction of certified copy records of United States Department of Justice where the prisoner's sentence was served in state prison; rather, this section requires the certificate of the chief officer of the state penitentiary wherein the accused served time. Higgins v. State, 235 Ark. 153, 357 S.W.2d 499 (1962).

Where evidence of prior convictions within the state was introduced by introducing the official record of the prior offenses with the records and the defendant, both being identified by the court clerk, this method was more reliable than the usual certified copies and did not prejudice the defendant. Thompson v. State, 252 Ark. 1, 477 S.W.2d 469 (1972).

It was not reversible error for clerk to read portion of prior judgment. Woods v. State, 260 Ark. 882, 545 S.W.2d 912 (1977).

Where there was a clear indication on each of the docket sheets showing a prior driving while intoxicated (DWI) conviction and where the defendant waived the right to counsel, the docket sheets satisfied the requirements of this section since each was a duly certified copy of the record of a prior conviction. Moore v. State, 315 Ark. 131, 864 S.W.2d 863 (1993).

—Sufficiency of Evidence.

Evidence held insufficient to establish prior convictions. Higgins v. State, 235 Ark. 153, 357 S.W.2d 499 (1962); Richards v. State, 254 Ark. 760, 498 S.W.2d 1 (1973); McConahay v. State, 257 Ark. 328, 516 S.W.2d 887 (1974); Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975); Klimas v. State, 259 Ark. 301, 534 S.W.2d 202, cert. denied, 429 U.S. 846, 97 S. Ct. 128, 50 L. Ed. 2d 117 (1976).

Evidence held sufficient to establish prior convictions. Henson v. State, 248 Ark. 992, 455 S.W.2d 101 (1970); Edens v. State, 258 Ark. 734, 528 S.W.2d 416 (1975); Parker v. State, 258 Ark. 880, 529 S.W.2d 860 (1975).

Cited: Atkins v. State, 287 Ark. 445, 701 S.W.2d 109 (1985).

16-90-205. Trial procedure for habitual criminals.

The following trial procedure shall be adhered to in cases involving habitual criminals:

(1) The jury shall first hear all of the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict as to this charge based only upon the evidence. However, nothing in this subdivision (1) shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his or her own defense;

(2) If the defendant is found guilty, the same jury shall sit again and hear evidence of the defendant's prior conviction or convictions. However, the defendant shall have the right to deny the existence of any prior convictions and to offer evidence in support of this denial; and

(3) The jury shall again retire, and if it is found that one (1) or more prior convictions exist or if the defendant admits the previous conviction or convictions, then the prior conviction or convictions shall be considered in fixing the punishment for the current offense for which the defendant has been convicted in accordance with § 16-90-201.

History. Acts 1967, No. 639, § 2; A.S.A. 1947, § 43-2330.1.

Cross References. Sentencing procedure, § 5-4-502.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments, 45 Ark. L. Rev. 257.

Note, Conley v. State: Mitigation Before Guilt, 45 Ark. L. Rev. 995.

CASE NOTES

Analysis

Construction.
Purpose.
Bifurcation.
Instructions.
Objection.
Proof of prior convictions.
—Assistance of counsel.
Sentencing.

Construction.

This section and § 5-4-502 both address the bifurcated procedure for trials involving habitual criminals; this title addresses judgment and sentencing generally, and Title 5 addresses disposition of offenders. Thomas v. State, 315 Ark. 518, 868 S.W.2d 85 (1994).

Both this section and § 5-4-502 provide that evidence of prior convictions shall not be considered until after the defendant is found guilty. Thomas v. State, 315 Ark. 518, 868 S.W.2d 85 (1994).

Although this section contains a provision which states "nothing in this subdivision shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his own defense," § 5-4-502 does not contain a corresponding provision. Thomas v. State, 315 Ark. 518, 868 S.W.2d 85 (1994).

Purpose.

Trial of an habitual offender is bifurcated only to protect the defendant by withholding proof of his earlier convictions until the jury has found him guilty, and the sole purpose of the second stage is to allow the jury to consider possible enhancement of the sentence, not its reduction. Heard v. State, 272 Ark. 140, 612 S.W.2d 312 (1981).

There is no indication in this section of a legislative intention to permit a habitual offender to introduce any evidence during the second state of the trial except proof to rebut the evidence of previous convictions. Heard v. State, 272 Ark. 140, 612 S.W.2d 312 (1981).

Bifurcation.

Only the issue of guilt or innocence upon the charge should have been considered by the jury upon its first retirement to the jury room. Ridgeway v. State, 251 Ark. 157, 472 S.W.2d 108 (1971).

Bifurcated procedure held proper. Rimes v. State, 251 Ark. 678, 474 S.W.2d 115 (1971); Ellingburg v. State, 254 Ark. 199, 492 S.W.2d 904 (1973); Woods v. State, 260 Ark. 882, 545 S.W.2d 912 (1977).

This section provides for a bifurcated trial and does not provide for waiver; the bifurcated procedure "shall" be adhered to in cases involving habitual criminals. Griffin v. State, 307 Ark. 537, 823 S.W.2d 446 (1992).

Instructions.

Instruction advising the jury as to the forms of verdict, both as to a finding of

guilty or not guilty and concluding, "When your return either of those verdicts into court, then you may or may not have another verdict to consider," was not necessary but was not to be interpreted as telling the jury that defendant had been previously convicted. Henson v. State, 248 Ark. 992, 455 S.W.2d 101 (1970).

Objection.

Introduction of evidence under the habitual criminal act was proper where appellant and his codefendant had been previously convicted at least once of a crime punishable by confinement in the state penitentiary and defendant merely made a general objection to introduction of certified copies of past convictions. Thacker v. State, 253 Ark. 864, 489 S.W.2d 500 (1973).

Proof of Prior Convictions.

Even though defendant was also charged as a habitual offender, there was no error in the court's allowing him to be cross-examined concerning prior conviction and even asked if he was a habitual criminal. Coleman v. State, 256 Ark. 665, 509 S.W.2d 824 (1974).

The state has the burden of proving any prior convictions. McConahay v. State, 257 Ark. 328, 516 S.W.2d 887 (1974); Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

Docket sheet may not be used to establish a prior conviction for purposes of sentencing under the habitual criminal statute. Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

For discussion of stipulation as to prior convictions, see: Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979); Morrow v. State, 271 Ark. 806, 610 S.W.2d 878, cert. denied, 454 U.S. 819, 102 S. Ct. 99, 70 L. Ed. 2d 89 (1981).

The introduction of a prior criminal conviction is not forbidden during the guilt/innocence phase of a bifurcated trial. Thomas v. State, 315 Ark. 518, 868 S.W.2d 85 (1994).

—Assistance of Counsel.

Where prior conviction failed to show either that defendant was represented by counsel or that he had waived counsel, admission into evidence of this conviction was error, and state had option of retrying the case or accepting the minimum penalty. Wilburn v. State, 253 Ark. 608, 487 S.W.2d 600 (1972).

Evidence of a defendant's prior convictions for purposes of applying the Arkansas habitual criminal act must establish that the defendant either received assistance from an attorney or validly waived counsel at the time of each prior conviction. Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979).

Where one of the defendant's three prior convictions was a felony conviction, which resulted from the defendant having two prior misdemeanor convictions for the same offense, and the record showed that the defendant was represented by an attorney at the felony conviction, the felony conviction could be used for charging the defendant as a habitual criminal, despite the bald assertion by the defendant's present counsel that the defendant did not have counsel at the hearings on the misdemeanor convictions. Porter v. State, 281 Ark. 277, 663 S.W.2d 723 (1984).

Sentencing.

In the sentencing phase, the state may only introduce evidence of prior convictions, and the accused may only introduce evidence to rebut the existence of those convictions. Conley v. State, 305 Ark. 422, 808 S.W.2d 745, cert. denied, 502 U.S. 876, 112 S. Ct. 218, 116 L. Ed. 2d 176 (1991).

Cited: Richards v. State, 254 Ark. 760, 498 S.W.2d 1 (1973); Tosh v. State, 278 Ark. 377, 646 S.W.2d 6 (1983); Christian v. Housewright, 721 F.2d 240 (8th Cir. 1983); Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996).

Subchapter 3 — Restitution to Victims

SECTION.

16-90-301. Legislative determination.
16-90-302. Subchapter amendatory and supplemental.
16-90-303 — 16-90-306. [Repealed.]
16-90-307. Restitution fund.
16-90-308. Proceeds from sale of rights arising from criminal act.
16-90-309. Restitution for theft of public property.
16-90-310. Theft of public property — Lien on defendant's property.

SECTION.
16-90-311. Restitution for audit investigation costs.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-301 — 16-90-308 and 16-90-311 may not apply to §§ 16-90-309 and 16-90-310 which were not assigned when enacted.

Cross References. Restitution as criteria, condition for suspension or probation, §§ 5-4-301, 5-4-303.

Restitution from inmate's earnings in work programs, § 12-30-406.

RESEARCH REFERENCES

ALR. Statutes providing for compensation of crime victim. 20 ALR 4th 63.

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 1321 et seq.

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

CASE NOTES

Analysis

Duty of court.
Notice.

Duty of Court.

Under this subchapter, the court has an affirmative duty, as far as is practicable, to require the responsible offender to make restitution to his victim. Irvin v. State, 28 Ark. App. 6, 771 S.W.2d 26 (1989).

Notice.

Since passage of this subchapter, a criminal defendant is put on notice that he is also subject to the sanction of restitution in addition to imprisonment and a fine. Irvin v. State, 28 Ark. App. 6, 771 S.W.2d 26 (1989).

16-90-301. Legislative determination.

The General Assembly recognizes that many innocent persons suffer injury, death, property damage, and resultant financial hardship because of crimes committed in this state and that there is a genuine need in this state to establish a method whereby the responsible offender, as far as practicable, may be required to make restitution to his or her victim so as to make that victim whole with respect to the financial injury suffered.

History. Acts 1981, No. 704, § 1; A.S.A. 1947, § 43-2350.

CASE NOTES

Analysis

Purpose.
Restitution amount improper.

Purpose.

The express purpose of restitution is to make the victim whole with respect to the financial injury suffered. In re Sutherland, 161 Bankr. 657 (Bankr. E.D. Ark. 1993).

Where defendant was convicted for failing to pay child support for six years, § 5-1-109(b)(2) did not limit the restitution order to three years because so limit-

ing the restitution would have violated the policy of this section, which was to make victims whole. Hampton v. State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 320 (May 20, 2004).

Restitution Amount Improper.

Trial court's restitution order that included items on it for which defendant had not been charged was improper as the purpose of restitution was to make the victim whole with respect to the financial injury suffered as a result of the victim's crime and there was no proof that many of the items included were the result of this crime. Simmons v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 232 (Mar. 16, 2005).

16-90-302. Subchapter amendatory and supplemental.

The provisions of this subchapter are amendatory and supplemental to Act 482 of 1977, as amended.

History. Acts 1981, No. 704, § 6; A.S.A. 1947, § 43-2355.

Cross References. Allocation of earnings and inmate's funds, § 12-30-406.

Conditions for suspension or probation, § 5-4-303.

Contracts for inmate labor, § 12-30-405.

Crimes for which suspension or probation prohibited; criteria for suspension or probation in other cases, § 5-4-301.

Housing of participants, § 12-30-407.

Rules and regulations generally, § 12-30-403.

Work, rehabilitative and work-release programs, § 12-30-401.

16-90-303 — 16-90-306. [Repealed.]

Publisher's Notes. These sections, concerning restitution, judgments, and determination of amount, were repealed by identical Acts 1993, Nos. 533 and 553, § 5. The sections were derived from the following sources:

16-90-303. Acts 1981, No. 704, § 2; A.S.A. 1947, § 43-2351.

16-90-304. Acts 1981, No. 704, § 3; A.S.A. 1947, § 43-2352.

16-90-305. Acts 1981, No. 704, § 4; A.S.A. 1947, § 43-2353.

16-90-306. Acts 1981, No. 704, § 5; A.S.A. 1947, § 43-2354.

For present law, see § 5-4-205.

16-90-307. Restitution fund.

(a) The circuit judges of each judicial district may establish a restitution fund to be administered by the circuit judge, the prosecuting attorney, or probationary agency, whichever the circuit judge shall designate.

(b) The circuit judges shall provide rules and regulations for this fund and shall supervise it.

(c)(1) The circuit judges may levy additional fines against criminal defendants and place the additional fine money in the restitution fund of the judicial district.

(2) The additional fines shall be in an amount not to exceed the amount of the criminal penalty fine provided by law for the offense.

(3) The additional fine money shall be remitted to the fund, to be deposited in a depository other than the county treasurer or State Treasury.

(d) Application for restitution may be made by victims of crime by written petition to the circuit judge, and the application shall be ruled upon without hearing.

(e) Nothing in this section shall be construed as prohibiting any circuit judge from requiring any specific defendant to make direct restitution to specific victims.

History. Acts 1983, No. 807, § 1; A.S.A. 1947, § 43-2356.

CASE NOTES

Jurisdiction.

Because restitution directed against defendant was comprised of money that in reality constituted a fine, the trial judge's actions at the earlier revocation hearing amounted to executing defendant's sentence; the plea of guilty, coupled with a fine and probation, constituted a conviction, thereby depriving the trial court of jurisdiction to amend or modify that sentence at a later date. Clampet v. State, 352 Ark. 176, 99 S.W.3d 414 (2003).

16-90-308. Proceeds from sale of rights arising from criminal act.

(a)(1) Any person referred to as the defendant in this section who has been convicted of or pleaded guilty or nolo contendere to any crime who contracts to reenact the crime by use of any book, motion picture, magazine article, radio or television presentation, live entertainment, or any live or recorded presentation, or from the expression of his or her thoughts, opinions, or emotions regarding the crime, shall pay to the circuit court wherein the charges were filed any money or thing of value contracted to be paid to the defendant or his or her spouse, heirs, assigns, and transferees.

(2) The circuit court shall deposit the moneys in an escrow account for the benefit of and payable to any victim, or his or her legal representative, of crimes committed by the defendant.

(b) Payments from the account shall be made to the defendant upon an order of the judge of the circuit court wherein the charges were filed upon a showing that the money or thing of value shall be used for the exclusive purpose of retaining legal representation for the defendant at any stage of the criminal proceedings arising out of the criminal charge and that the defendant would otherwise be unable to afford adequate representation.

(c)(1) Payments from the account shall be used to satisfy any civil judgment rendered in favor of a victim or his or her legal representative which arose out of the circumstances upon which the defendant's conviction was based, but only if the victim brings a civil action to recover money against the defendant.

(2) If no victim or legal representative of a victim has filed suit within five (5) years from the filing of the charges, any money remaining shall be paid over to any state-supported victim reparation or assistance program.

(3) Upon the disposition of the criminal charges in favor of the defendant, money in the account shall be paid over to the defendant.

(d) The circuit court in which the charges were filed shall publish a notice in at least one (1) newspaper of general circulation in each county

of the state one (1) time every year for four (4) years from the date the money is deposited with the court, notifying any eligible victim or legal representative of an eligible victim that moneys are available to satisfy judgments pursuant to this section.

History. Acts 1985, No. 382, §§ 1-4; 1985, No. 401, §§ 1-4; A.S.A. 1947, §§ 43-2357 — 43-2360.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 8 UALR L.J. 559.

16-90-309. Restitution for theft of public property.

(a) When any defendant is found guilty or pleads guilty or nolo contendere to theft or any other offense affecting property held by or belonging to the state or any political subdivision thereof, the court shall require the payment of restitution for the benefit of the state or the applicable political subdivision as part of the sentence.

(b) The court shall set the amount of restitution based on reliable and probative evidence. Any amounts received by the state or a political subdivision from the Self-Insured Fidelity Bond Program, § 21-2-701 et seq., or other third party bonds as a result of the defendant's actions shall not reduce the amount of restitution required to be paid by the defendant.

(c) If payments are made by the Self-Insured Fidelity Bond Program to reimburse the state or political subdivision for losses incurred as a result of the actions of the defendant, the Self-Insured Fidelity Bond Program is entitled to receive priority to any restitution ordered and received by the court up to the amount paid by the Self-Insured Fidelity Bond Program to the state or political subdivision.

(d) The Self-Insured Fidelity Bond Program is subrogated to any right of the state or political subdivision to the extent of any proceeds paid by the Self-Insured Fidelity Bond Program.

(e) If restitution is allowed to be made over a period of time, the court shall also require the payment of interest on the amount of outstanding restitution. Interest shall begin to accrue from the date the court-ordered restitution is filed with the court clerk. The court shall determine the rate of interest to be assessed.

(f) An order of restitution for the benefit of the state or any political subdivision pursuant to the provisions of this section and § 16-90-310 does not bar any civil remedy that may also be available under law.

History. Acts 1993, No. 193, §§ 1, 2, 4; 1993, No. 520, §§ 1, 2, 4.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-301 — 16-90-308 may not apply to this section which was enacted subsequently.

References to "this chapter" in § 16-90-803 and 16-90-804 may not apply to this section which was enacted subsequently.

CASE NOTES

Fidelity Bond Trust Fund.

Section 21-2-708, regarding the Self-Insured Fidelity Bond Program, under which the Arkansas Fidelity Bond Trust Fund was created, was recently amended to expressly provide that the Arkansas Fidelity Bond Trust Fund is a victim who is entitled to restitution. In re Sutherland, 161 Bankr. 657 (Bankr. E.D. Ark. 1993).

The Arkansas Fidelity Bond Trust Fund, which reimbursed a school district for losses caused by an embezzling employee, was the entity entitled to collect the restitution ordered in the judgment of employee's conviction; the fact that the statutorily created bond company was required to reimburse the immediate victim does not obviate the economic loss to the state. In re Sutherland, 161 Bankr. 657 (Bankr. E.D. Ark. 1993).

16-90-310. Theft of public property — Lien on defendant's property.

(a) When any defendant is found guilty of or pleads guilty or nolo contendere to theft or any other offense affecting property held by or belonging to the state or any political subdivision thereof, the circuit court shall order a lien upon any and all property, refunds, or any other items in which the defendant may have a vested interest.

(b)(1) The purpose of the lien is to secure the payment of any restitution, fines, court costs, or other payments that may be ordered by the court.

(2)(A) The lien shall have the same effect as any other civil judgment.

(B) The state or the applicable political subdivision may execute upon the judgment in any manner provided by law.

(C) Notwithstanding any other provisions of law, the state or any political subdivision may execute upon any funds held by a state public retirement system or any state agency or political subdivision in which the defendant may have a vested interest.

(3) The court shall order that these liens be released upon satisfaction of all payments ordered by the court.

History. Acts 1993, No. 193, § 3; 1993, No. 520, § 3.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-301 — 16-90-308 may not apply to this section which was enacted subsequently.

References to "this chapter" in § 16-90-803 and 16-90-804 may not apply to this section which was enacted subsequently.

16-90-311. Restitution for audit investigation costs.

(a) When any defendant is found guilty of or pleads guilty or nolo contendere to theft or any other offense affecting property held by or belonging to the State of Arkansas or any political subdivision of the state, and the Division of Legislative Audit has incurred costs in the investigation of the transactions, the court shall require as part of the sentence the payment of restitution for the audit investigation costs to be payable to the Division of Legislative Audit.

(b)(1) The court shall set the amount of restitution based on audit investigative costs records provided by the Division of Legislative Audit.

(2) Any amounts received by the state or a political subdivision from the Self-Insured Fidelity Bond Program, § 21-2-701 et seq., or other third-party bonds as a result of the defendant's actions shall not reduce the amount of restitution required to be paid by the defendant.

History. Acts 2005, No. 904, § 1.

Subchapter 4 — Execution of Sentence — Confinement

SECTION.
16-90-401. Delivery of copy of judgment to sheriff.
16-90-402. Delivery of defendant and copy of judgment to proper officials.
16-90-403. Power of sheriff to prevent escape, etc.
16-90-404. Written return of sheriff.
16-90-405. Filing of judgment with clerk.
16-90-406. [Repealed.]
16-90-407. Confinement in default of payment of fine.
16-90-408. Grounds for removal of person in confinement.
16-90-409. Judgment — Abatement of nuisance, etc.

Effective Dates. Acts 1881, No. 81, § 16: effective on passage.

Acts 1883, No. 78. § 6: effective on passage.

Acts 1985, No. 827, § 3: Apr. 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is immediately necessary for the Department of Correction to conform to the guidelines established by the Interstate Corrections Compact to make more orderly the transporting of prisoners. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 972 et seq.

C.J.S. 24 C.J.S., Crim. L., § 1570 et seq.

16-90-401. Delivery of copy of judgment to sheriff.

Where a judgment of confinement, either in the penitentiary or county jail, is pronounced, a certified copy of the judgment must be furnished forthwith to the sheriff, who shall thereupon execute it, and no other warrant or authority is necessary to its execution.

History. Crim. Code, § 288; C. & M. Dig., § 3253; Pope's Dig., § 4097; A.S.A. 1947, § 43-2601.

16-90-402. Delivery of defendant and copy of judgment to proper officials.

(a) The sheriff, in executing a judgment of confinement, shall deliver the defendant with a certified, standardized copy of the judgment and commitment to the officials of the Department of Correction or to the jailer, as indicated in the judgment.

(b) The standardized copy shall be developed by representatives from the Department of Correction, the Arkansas Judicial Council, and the Arkansas Prosecuting Attorneys' Association.

History. Crim. Code, § 293; C. & M. Dig., § 3264; Pope's Dig., § 4109; Acts 1985, No. 975, § 1; A.S.A. 1947, § 43-2602.

CASE NOTES

Cited: Cooper v. State, 278 Ark. 394, 645 S.W.2d 950 (1983); Hunter v. State, 278 Ark. 428, 645 S.W.2d 954 (1983).

16-90-403. Power of sheriff to prevent escape, etc.

In conveying the defendant to the penitentiary, the sheriff shall have all the powers of preventing an escape, of resisting an effort to rescue the defendant, of recapturing the defendant, and of summoning persons to his or her aid that the sheriff would have in executing a warrant of arrest in his or her county.

History. Crim. Code, § 294; C. & M. Dig., § 3263; Pope's Dig., § 4108; A.S.A. 1947, § 43-2603.

16-90-404. Written return of sheriff.

The sheriff shall make a written return of the execution of the judgment of imprisonment and file the return with the clerk of the court within ten (10) days after the execution of judgment.

History. Crim. Code, § 295; C. & M. Dig., § 3265; Pope's Dig., § 4110; A.S.A. 1947, § 43-2604.

16-90-405. Filing of judgment with clerk.

(a) It shall be the duty of the justice of the peace or the clerk of the court rendering a judgment or sentence of conviction in misdemeanor cases when the defendant is committed to the county jail to file a copy of the judgment or sentence in the office of the clerk of the county court, together with a full itemized statement of the fine and costs adjudged, as well as a concise statement of the time the convict may be held to labor in discharge of the judgment or sentence.

(b) The clerk of the county court shall register the judgment or sentence in a book to be kept by him for that purpose.

History. Acts 1881, No. 81, § 15, p. 148; 1883, No. 78, § 4, p. 125; C. & M. Dig., § 2089; Pope's Dig., § 2691; A.S.A. 1947, § 43-2605.

16-90-406. [Repealed.]

A.C.R.C. Notes. Acts 2005, No. 884, § 1, provided: "Legislative findings and determinations. The General Assembly of the State of Arkansas finds and determines that:

"(1) As provided in § 16-11-301, all statutes concerning pleading, practice, and procedure are superseded by rules adopted by the Supreme Court pursuant to Arkansas Constitution, Amendment 80, § 3, or pursuant to the Supreme Court's constitutional, inherent, or statutory authority prior to the effective date of Arkansas Constitution, Amendment 80;

"(2) In Administrative Order No. 8, Section III, the Supreme Court established a procedure for completion and delivery of judgment and commitment orders; and

"(3) The existing statutory procedure concerning delivery of a copy of a warrant of commitment or court order is superseded."

Publisher's Notes. This section, concerning a prisoner's entitlement to a copy of a warrant of commitment or court order, was repealed by Acts 2005, No. 884, § 2. The section was derived from Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5100; Pope's Dig., § 6363; A.S.A. 1947, § 43-2608.

16-90-407. Confinement in default of payment of fine.

(a) The defendant shall not be held in confinement under an execution for a fine for a longer period than at the rate of one (1) day for each two dollars ($2.00) of the fine. However, the confinement shall not discharge the fine, which thereafter can only be collected by proceeding against the defendant's property.

(b) The provisions of this section shall not apply to judgments in city or police courts, which may be discharged by confinement in the city workhouse, according to the provisions of the special statutes regulating them.

History. Crim. Code, § 299; C. & M. Dig., § 3266; Pope's Dig., § 4111; A.S.A. 1947, § 43-2606.

Publisher's Notes. Subsection (a) of this section may be affected by §§ 5-4-203, 16-90-108.

Cross References. Consequences of nonpayment of fine or costs, § 5-4-203.

CASE NOTES

Form of Judgment.

One imprisoned for failure to pay a fine is not entitled to discharge because the judgment imposing the fine failed to specify the extent of the imprisonment which should be imposed upon the defendant in the event of his failure to pay the fine. Ex parte Brady, 70 Ark. 376, 68 S.W. 34 (1902).

16-90-408. Grounds for removal of person in confinement.

A person committed to prison for any criminal offense who is in the custody of an officer shall not be removed from the prison or delivered to the custody of any other officer, except in the following cases:

(1) By writ of habeas corpus or some other legal writ or under the guidelines of the Interstate Corrections Compact, § 12-49-101 et seq.;

(2) When he or she may be delivered to an officer, to be removed to some common jail;

(3) In case of fire, infectious disease, or other great necessity; or

(4)(A) When the prisoner is charged by affidavit with treason or felony committed in some other state or territory of the United States of America.

(B) In such a case, on the demand of the executive of that state or the governor of a territory of the United States from which the prisoner fled, the prisoner shall be sent in custody by order of any circuit court or may be bound by recognizance, with good security by the court to appear at the proper time and place and surrender himself or herself to the court or tribunal having jurisdiction of the offense if the court, upon consideration of the evidence, shall be of the opinion that he or she should be put upon trial.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1[388], p. 255; C. & M. Dig., §§ 32671/2, 5118; Pope's Dig., §§ 4113, 6381; Acts 1985, No. 827, § 1; A.S.A. 1947, § 43-2607.

CASE NOTES

Prisoner as Witness.

Circuit court may have a competent witness who is confined in jail brought before it by habeas corpus to testify in behalf of the defendant in a criminal case. Giboney v. Rogers, 32 Ark. 462 (1877).

16-90-409. Judgment — Abatement of nuisance, etc.

(a) A certified copy of the judgment delivered to the sheriff shall authorize and require him or her to execute a judgment for the abatement or removal of a nuisance or for anything other than the payment of money by the defendant.

(b) The sheriff shall make a return of his or her execution of the judgment and file the return with the clerk of the court within sixty (60) days after the copy is delivered to him or her.

History. Crim. Code, § 298; C. & M. Dig., § 3267; Pope's Dig., § 4112; A.S.A. 1947, § 43-2609.

CASE NOTES

Gaming House.

Maintenance of a gaming house is a criminal offense and it cannot be abated by injunction as a public nuisance, the only remedy being under this section. State v. Vaughan, 81 Ark. 117, 98 S.W. 685 (1906).

Subchapter 5 — Execution of Sentence — Death Penalty

SECTION.
16-90-501. Delivery of copy of judgment and convict to penitentiary.
16-90-502. Conduct of execution.
16-90-503. Certification of execution.
16-90-504. [Repealed.]

SECTION.
16-90-505. Return of body.
16-90-506. Reprieve, new trial, etc.
16-90-507. Failure to execute on appointed day.

Cross References. Procedure upon affirmance of death penalty by Supreme Court, RAP-Crim 10.

Warrant for execution when death sentence affirmed, § 16-91-115.

Effective Dates. Acts 1887, No. 24, § 3: effective on passage.

Acts 1905, No. 295, § 2: effective on passage.

Acts 1993, No. 914, § 5: Apr. 7, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that present law does not utilize the physical capabilities of the Department of Correction and that carrying out the death penalty under these changes is necessary for the peace, health and safety of the state. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 21A Am. Jur. 2d, Crim. L., § 956 et seq.

C.J.S. 24 C.J.S., Crim. L., § 1591 et seq.

16-90-501. Delivery of copy of judgment and convict to penitentiary.

(a) The clerk of the court in which is pronounced the sentence of death against any convict shall deliver a certified copy thereof to the superintendent of the penitentiary as soon as may be after the sentence.

(b) When a judgment of death is pronounced upon any person upon conviction of a capital offense, the person shall be immediately conveyed to the state penitentiary by the sheriff of the county in which the trial was held and shall be delivered to the keeper or superintendent of the state penitentiary and kept there awaiting execution.

History. Acts 1913, No. 55, § 3; C. & M. Dig., § 3253; Pope's Dig., § 4098; A.S.A. 1947, § 43-2610.

CASE NOTES

Termination of Court's Authority.

After sentence has been pronounced, the court has been adjourned and the prisoner transported to the penitentiary awaiting execution, the trial court is not authorized to inquire into prisoner's sanity. Howell v. Kincannon, 181 Ark. 58, 24 S.W.2d 953 (1930).

16-90-502. Conduct of execution.

(a) Each execution shall be conducted by the Director of the Department of Correction or some assistant or assistants designated by him or her.

(b) The punishment of death must be carried out in the manner prescribed at § 5-4-617 in every case.

(c) The director or the assistants appointed by him or her shall proceed unless a suspension of execution is ordered, at the time named in the sentence, to cause the death of the felon under sentence of death in the manner prescribed at § 5-4-617.

(d)(1) No execution of any person convicted in this state of a capital offense shall be public, but shall be private.

(2) At the execution there shall be present the director or an assistant, the Department of Correction official in charge of medical services or his or her designee, and a number of respectable citizens numbering not fewer than six (6) nor more than twelve (12) whose presence is necessary to verify that the execution was conducted in the manner required by law. Counsel for the person being executed and the spiritual adviser to the person being executed may be present. Other persons designated by the director may be present, but the maximum number of persons at the execution shall not exceed thirty (30).

(3)(A) During the execution there shall be a closed-circuit audiovisual monitor placed in a location chosen by the director, and any close relatives of the deceased victim or any surviving innocent victims who desire to view the execution may be present. In no case shall the number of viewers exceed five (5) per execution. No audio or video recording shall be made of the execution.

(B) "Close relatives of the victim" means the following persons in relation to the victim for whose death an inmate is sentenced to death:

(i) The spouse of the victim at the time of the victim's death;

(ii) The parents or stepparents of the victim;

(iii) The adult brothers, sisters, children, or stepchildren of the victim; or

(iv) Any other adult relative with a close relationship to the victim.

(C) "Surviving innocent victims" means any person innocently present during the commission of the capital offence who sustains an injury, either physical or emotional, and such injury results in a separate conviction for a lesser offense which arises out of the same course of conduct.

History. Acts 1887, No. 24, §§ 1, 2, p. 29; 1901, No. 58, § 1, p. 105; 1905, No. 295, § 1, p. 723; 1913, No. 55, §§ 2, 4; C. & M. Dig., §§ 3254-3256; Pope's Dig., §§ 4099-4101; A.S.A. 1947, §§ 43-2611 — 43-2615; Acts 1997, No. 263, § 1; 1999, No. 78, § 1.

Cross References. Death chamber provided for, § 12-28-102.

Executions by lethal injections, § 5-4-617.

RESEARCH REFERENCES

ALR. Validity of rules and regulations concerning viewing of execution of death penalty. 107 ALR 5th 291.

CASE NOTES

Jury Deliberation.

It is not up to the jury to decide how a defendant is to die or whether death by electrocution is cruel and unusual punishment; nor is it a circumstance to be considered when the jury deliberates on mitigating circumstances. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Cited: Ferguson v. Martineau, 115 Ark. 317, 171 S.W. 472 (1914); Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915); Murray v. State, 249 Ark. 887, 462 S.W.2d 438 (1971).

16-90-503. Certification of execution.

(a) The Director of the Department of Correction shall certify the fact of the execution of the condemned felon to the clerk of the court by which the sentence was pronounced, who shall file the certificate with the papers of the case and enter it upon the records of the case.

(b) If the office of director is abolished, the duties devolving on him or her shall be performed by any other person selected by any board or commission having charge of the penitentiary.

History. Acts 1913, No. 55, § 5; C. & M. Dig., § 3257; Pope's Dig., § 4102; A.S.A. 1947, § 43-2616.

16-90-504. [Repealed.]

Publisher's Notes. This section, prohibiting the publishing of criminal execution details, was repealed by identical Acts 1995, Nos. 206 and 289, § 1. The section was derived from Acts 1913, No. 55, § 10; C. & M. Dig., § 3260; Pope's Dig., § 4105; A.S.A. 1947, § 43-2619.

16-90-505. Return of body.

Upon application of a relative of the person executed, the body after execution may be returned to his or her address and at his or her cost.

History. Acts 1913, No. 55, § 11; C. & M. Dig., § 3261; Pope's Dig., § 4106; A.S.A. 1947, § 43-2620.

16-90-506. Reprieve, new trial, etc.

(a)(1) Should the condemned felon, while in the custody of the Director of the Department of Correction, be granted a reprieve by the Governor or obtain a writ of error from the Supreme Court or should the execution of the sentence be stayed by any competent judicial proceeding, notice of the reprieve or writ of error or stay of execution shall be served upon the Director of the Department of Correction, as well as upon the condemned felon, and he or she shall yield obedience to it.

(2) In any subsequent proceeding, the mandate of the court having regard to the condemned felon shall be served upon the Director of the Department of Correction as well as upon the felon.

(3) If the felon is resentenced by the court, the proceedings shall be as provided under the original sentence.

(b) If a new trial is granted to the condemned felon after he or she has been conveyed to the Department of Correction, he or she shall be conveyed back to the place of trial as the Director of the Department of Correction may direct.

(c) The only officers who shall have the power of suspending the execution of a judgment of death are:

(1) The Governor;

(2) In cases of insanity or pregnancy of the individual, the Director of the Department of Correction as provided in subsection (d) of this section; and

(3) In cases of appeals, the Clerk of the Supreme Court, as prescribed by law.

(d)(1)(A) When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment, the Director of the Department of Correction shall notify the Deputy Director of the Division of Behavioral Health of the Department of Health and Human Services. The Director of the Department of Correction shall also notify the Governor of this action. The Division of Behavioral Health of the Department of Health and Human Services shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days of receipt of notification. The attorney of record of the individual shall also be notified of this action, and reasonable allowance will be made for an independent mental health evaluation to be made. A copy of the report of the evaluation by the Division of Behavioral Health of the Department of Health and Human Services shall be furnished to the Department of Correction Mental Health Services, along with any recommendations for treatment of the individual. All responsibility for implementation of treatment remains with the Department of Correction Mental Health Services.

(B)(i) If the individual is found competent to understand the nature of and reason for the punishment, the Governor shall be so notified and shall order the execution to be carried out according to law.

(ii) If the individual is found incompetent due to mental illness, the Governor shall order that appropriate mental health treatment be provided. The Director of the Department of Correction may order a reevaluation of the competency of the individual as circumstances may warrant.

(2) When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that a female convict under sentence of death is pregnant, he or she shall suspend the execution until it appears that she is not pregnant or until she has delivered the child.

History. Crim. Code, §§ 290, 291; Acts 1913, No. 55, §§ 6, 7; C. & M. Dig., §§ 3250, 3251, 3258, 3259; Pope's Dig., §§ 4095, 4096, 4103, 4104; Acts 1959, No. 228, §§ 1, 2; A.S.A. 1947, §§ 43-2617, 43-2618, 43-2621, 43-2622; Acts 1993, No. 914, § 1.

Cross References. Manner of applying for executive clemency, § 5-4-607.

RESEARCH REFERENCES

Ark. L. Rev. Byers, Incompetency, Execution, and the Use of Antipsychotic Drugs, 47 Ark. L. Rev. 361.

CASE NOTES

Analysis

Constitutionality.
Construction.
Applicability.
Clemency.
Insanity.
Jurisdiction.

Constitutionality.

Where this section's requirements were followed, no due process violation occurred even if it was held to create a liberty interest. Rector v. Lockhart, 783 F. Supp. 398 (E.D. Ark.), aff'd, 971 F.2d 751 (8th Cir. 1992).

This section does not contain the particularized substantive standards which significantly guide the decision makers, or the mandatory language that the decision makers are required to act in a certain way, necessary to create a liberty interest. Rector v. Lockhart, 783 F. Supp. 398 (E.D. Ark.), aff'd, 971 F.2d 751 (8th Cir. 1992).

The procedural requirement for the protection of an insane person's right not to be executed under Ark. Const., Art. 2, § 9 and U.S. Const. Amend. 8, as set out in Marks v. United States, 430 U.S. 188 (1977), are met by subdivision (d)(1) of this section. Singleton v. Endell, 316 Ark. 133, 870 S.W.2d 742, cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

The earlier version of subdivision (d)(1) of this section was not unconstitutional; however, Acts 1993, No. 914, rewrote the subdivision to provide for, as additional safeguards, the notification of counsel for the inmate and "reasonable allowance" for "an independent mental health evaluation." Singleton v. Endell, 316 Ark. 133, 870 S.W.2d 742, cert. denied, 513 U.S. 960, 115 S. Ct. 419, 130 L. Ed. 2d 334 (1994).

Construction.

Since subsection (a) constitutes legislative recognition of the inherent judicial power to suspend an execution after its date has been set, subsection (c) cannot be strictly construed as reserving this power to the Governor. Leggett v. State, 231 Ark. 13, 328 S.W.2d 252 (1959).

Due to the unique circumstance where a constitutional issue of first impression was pending before the county circuit court but no decision had yet been rendered, that preceding was deemed to be a "competent judicial proceeding" allowing the Arkansas Supreme Court to grant a stay two days before the scheduled date of the execution. Singleton v. Norris, 332 Ark. 196, 964 S.W.2d 366 (1998).

Applicability.

One convicted of less than a capital offense is not entitled to the benefit of this section. Kelley v. State, 157 Ark. 48, 247 S.W. 381 (1923).

Clemency.

Circumstances arising after the crime affect the matter of clemency and should properly be addressed to the Governor after the courts are done with the case. Rector v. Clinton, 308 Ark. 104, 823 S.W.2d 829 (1992).

Insanity.

After sentence has been pronounced, the court adjourned, and a prisoner transported to the penitentiary awaiting execution, the trial court is not authorized to inquire into his insanity arising after the judgment or to make any orders in regard thereto. Howell v. Kincannon, 181 Ark. 58, 24 S.W.2d 953 (1930).

Superintendent has discretion in calling for sanity determination. Howell v.

Todhunter, 181 Ark. 250, 25 S.W.2d 21 (1930); Black v. State, 216 Ark. 805, 227 S.W.2d 629 (1950); Leggett v. Henslee, 230 Ark. 183, 321 S.W.2d 764, cert. denied, 361 U.S. 865, 80 S. Ct. 127, 4 L. Ed. 2d 106 (1959).

Supreme Court has no jurisdiction to issue writ of mandamus to compel warden of penitentiary to inquire into sanity of prisoner awaiting execution. Howell v. Todhunter, 181 Ark. 250, 25 S.W.2d 21 (1930).

Petition for habeas corpus alleging present insanity of petitioner was denied where the question could be determined as provided by this section. Mitchell v. State, 233 Ark. 578, 346 S.W.2d 201 (1961).

The Arkansas standard limiting executions of persons with mental deficiencies is no more stringent than that in Ford v. Wainright, 477 U.S. 399 (1986). Rector v. Clinton, 308 Ark. 104, 823 S.W.2d 829 (1992).

Jurisdiction.

The circuit court had no authority to stay the execution on the basis of the allegation of the prisoner's claim of current insanity; it lacked jurisdiction. Rector v. Clinton, 308 Ark. 104, 823 S.W.2d 829 (1992).

Cited: Maxwell v. Bishop, 257 F. Supp. 710 (E.D. Ark. 1966); Rector v. Clark, 923 F.2d 570 (8th Cir. 1991); Singleton v. Norris, 332 Ark. 668, — S.W.2d — (1998).

16-90-507. Failure to execute on appointed day.

(a) Whenever a judgment of death has not been executed on the day appointed therefor by the court from any cause whatever, the Governor shall fix the day of execution by a warrant under his or her hand and seal of the state.

(b) The warrant shall be obeyed by the Director of the Department of Correction and no one but the Governor may then suspend the execution.

History. Crim. Code, § 292; C. & M. Dig., § 3262; Pope's Dig., § 4107; Acts 1959, No. 228, § 3; A.S.A. 1947, § 43-2623.

CASE NOTES

Construction.

Since § 16-90-506(a) constitutes legislative recognition of the inherent judicial power to suspend an execution after its date has been set, this section cannot be strictly construed as reserving this power to the Governor. Leggett v. State, 231 Ark. 13, 328 S.W.2d 252 (1959).

Subchapter 6 — Expungement of Record

SECTION.
16-90-601. Minor felony offenders subsequently pardoned for offense.
16-90-602. Minor nonviolent felony offenders — Petition.
16-90-603. Minor felony offenders — Expungement of record.
16-90-604. [Repealed.]
16-90-605. Governor's pardon — Court order — Exclusions.

Cross References. Expungement of records of first offenders, § 16-93-301 et seq.

RESEARCH REFERENCES

ALR. Judicial expunction of criminal record of convicted adult. 11 ALR 4th 956.

Ark. L. Rev. Watkins, Access to Public Records under the Arkansas Freedom of Information Act, 37 Ark. L. Rev. 741.

16-90-601. Minor felony offenders subsequently pardoned for offense.

Any person who committed a felony in this state while under sixteen (16) years of age, was convicted and given a suspended sentence, subsequently received a pardon for the conviction, and has not since been convicted of another criminal offense shall have the criminal record expunged by the sentencing court.

History. Acts 1977, No. 800, § 1; A.S.A. 1947, § 43-2834; Acts 1995, No. 998, § 3.

16-90-602. Minor nonviolent felony offenders — Petition.

(a) A person who is convicted of a nonviolent felony committed while the person was under the age of eighteen (18) years and who was incarcerated or whose sentence was suspended, or who was placed on probation, may petition the convicting court to have the record of the conviction expunged upon completion of the sentence or expiration of the suspension or probation period or at any time thereafter.

(b) When a petition is filed with the court for expunging the record of conviction of a minor as authorized in this section, the court may enter an order expunging the record as requested in the petition if it determines that it is in the best interest of the petitioner and the state.

History. Acts 1977, No. 637, § 1; A.S.A. 1947, § 43-2831.

16-90-603. Minor felony offenders — Expungement of record.

The procedure, effect, and definition of "expungement" as used in this subchapter shall be in accordance with that established in § 16-90-901 et seq.

History. Acts 1977, No. 637, § 2; A.S.A. 1947, § 43-2832; Acts 1995, No. 998, § 4.

16-90-604. [Repealed.]

Publisher's Notes. This section, concerning the certificate of expungement for minor nonviolent felony offenders, was repealed by Acts 1995, No. 998, § 5. The section was derived from Acts 1977, No. 637, § 3; A.S.A. 1947, § 43-2833.

16-90-605. Governor's pardon — Court order — Exclusions.

(a) The Governor shall notify the sentencing court upon issuing a pardon and the court shall issue an order expunging the records relating to the conviction of the person pardoned.

(b) The records relating to the conviction of a person pardoned prior to July 15, 1991, shall be expunged upon a copy of the pardon's being filed with the sentencing court by the person.

(c) This section shall not apply to a pardon issued for:

(1) Any offense in which the victim is a person under the age of eighteen (18);

(2) Any sex offense; or

(3) An offense resulting in death or serious physical injury.

History. Acts 1991, No. 1224, § 1; 1995, No. 998, § 6.

A.C.R.C. Notes. Acts 1991, No. 1224, § 2, provided: "This act shall apply retroactively to pardons issued prior to July 15, 1991."

Subchapter 7 — Crime Victims Reparations

SECTION.
16-90-701. Title.
16-90-702. Legislative intent.
16-90-703. Definitions.
16-90-704. Penalty.
16-90-705. Crime Victims Reparations Board.
16-90-706. Powers of board — Logistical support.
16-90-707. Annual report by board.
16-90-708. Application forms — Cooperation by applicant.
16-90-709. Proceedings and record — Settlement of claims.
16-90-710. Waiver of physician-patient privilege — Examinations and reports.
16-90-711. Confidential information.
16-90-712. Conditions for reparations — Changes in awards.
16-90-713. Awards apart from prosecution.
16-90-714. Subrogation of state to claimant's rights.
16-90-715. Action by state against convicted person for recovery of reparations.
16-90-716. Limitation on reparations — Manner of payment.
16-90-717. Crime Victims Reparations Revolving Fund.
16-90-718. [Repealed.]
16-90-719. Property damage — Reparations — Intent.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-701 — 16-90-717 may not apply to § 16-90-719 which was enacted subsequently.

Cross References. Civil relief for victims of crime, § 16-118-107.

Effective Dates. Acts 1987, No. 817, § 22 provided: "Acts 1987, No. 817, §§ 20 and 21, which provide for the establishment of the Crime Victims Reparations Revolving Fund and for victim's reparations assessments, shall be effective in accordance with established law. The remaining sections of this Act shall be effective for criminally injurious conduct occurring on or after July 1, 1988."

Acts 1991, No. 396, § 10: Mar. 7, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain provisions of previous enactments of the General Assembly providing for reparations to crime victims failed to provide sufficient assessments to adequately fund the Crime Victims Reparations Fund and that it is therefore necessary to increase the amounts assessed to compensate and assist victims of criminal acts who suffer personal injury or

death. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 904, § 28: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the language of certain court cost statutes lacks uniformity; that such lack of uniformity is detrimental to the proper collection of such court costs; and that such language should be standardized to promote the proper collection of such costs. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governer [sic], it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 818, § 6: Mar. 26, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to compensate and assist victims of criminal acts who suffer personal injury or death, the Crime Victims Reparations Fund must be adequately funded and in order to maintain eligibility for certain federal monies presently available to the Crime Victims Reparations Fund and to make certain Arkansas residents who are injured or killed by acts of terrorism committed outside the United States are eligible to receive this help, this act is necessary. Therefore an emergeny is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1508, § 19: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that this act makes various technical corrections in the Arkansas Code; that this act further clarifies the law to provide that the Arkansas Code Revision Commission may correct errors resulting from enactments of prior sessions; and that this act should go into effect immediately in order to be applicable during the codification process of the enactments of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Procedure, 10 UALR L.J. 567.

CASE NOTES

Cited: Little Rock Family Planning Servs. v. Dalton, 860 F. Supp. 609 (E.D. Ark. 1994); Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 116 S. Ct. 1063, 134 L. Ed. 2d 115 (1996).

16-90-701. Title.

This subchapter shall be known and may be cited as the "Arkansas Crime Victims Reparations Act".

History. Acts 1987, No. 817, § 2.

16-90-702. Legislative intent.

It is the intent of the General Assembly to provide a method of compensating and assisting those persons within the state who are victims of criminal acts and who suffer personal injury or death. To this end, it is the further intent of the General Assembly to provide reparations, in the amount of expenses actually incurred as a direct result of the criminal acts of other persons up to a maximum amount of ten thousand dollars ($10,000). However, for those victims whose injuries are catastrophic and result in a total and permanent disability, the maximum amount shall not exceed twenty-five thousand dollars ($25,000).

History. Acts 1987, No. 817, § 1; 1999, No. 1178, § 1.

16-90-703. Definitions.

As used in this subchapter:

(1)(A) "Allowable expense" means charges incurred for needed products, services, and accommodations, including, but not limited to:

(i) Medical care;

(ii) Rehabilitation;

(iii) Rehabilitative occupational training;

(iv) Crime scene cleanup; and

(v) Other remedial treatment and care.

(B) It also includes a reasonable and necessary amount for expenses related to funeral, cremation, or burial;

(2) "Board" means the Crime Victims Reparations Board created by § 16-90-705;

(3)(A) "Claimant" means any of the following persons applying for reparations under this subchapter:

(i) A victim;

(ii) A dependent of a victim who has died because of criminally injurious conduct; or

(iii) A person authorized to act on behalf of any of the persons enumerated in this subdivision (3)(A).

(B) The term shall not include a service provider;

(4) "Collateral source" means a source of benefits or advantages for economic loss which the claimant has received or which is readily available to the claimant from any one (1) or more of the following:

(A) The offender;

(B)(i) The United States Government or any agency thereof in the form of benefits, such as social security, medicare, and medicaid; or

(ii) A state or any of its political subdivisions;

(C) State-required temporary nonoccupational disability insurance;

(D) Workers' compensation;

(E) Wage continuation programs of any employer;

(F) Proceeds of a contract of insurance payable to the claimant for loss which the victim sustained because of the criminally injurious conduct; or

(G) A contract providing prepaid hospital and other health care services or benefits for disability;

(5)(A)(i) "Criminally injurious conduct" means an act which occurs or is attempted in this state that results in personal injury or death to a victim, which act is punishable by fine, imprisonment, or death.

(ii) This term shall include acts of terrorism committed outside of the United States as defined in 18 U.S.C. § 2331 against any Arkansas resident.

(iii) This term shall not include acts arising out of the operation of motor vehicles, boats, or aircraft unless the acts were committed with the intent to inflict injury or death or unless the acts involve any of the following:

(*a*) Injury or death intentionally inflicted through the use of a motor vehicle, boat, or aircraft;

(*b*) A violation of the Omnibus DWI Act, § 5-65-101 et seq.; or

(*c*) A violation of § 27-53-101.

(B) For the purposes of this subchapter, a person shall be deemed to have committed criminally injurious conduct, notwithstanding that by reason of age, insanity, drunkenness, or other reason he or she was legally incapable of committing a crime;

(6) "Dependent" means a natural person wholly or partially dependent upon the victim for care or support and includes a child of the victim born after the death of the victim where the death occurred as a result of criminally injurious conduct;

(7) "Economic loss" means monetary detriment consisting of allowable expense and work loss, but shall not include noneconomic detriment;

(8) "Immediate family" means a person's spouse, children, parents or guardian, siblings, and grandparents, whether related by blood, adoption, or marriage;

(9) "Noneconomic detriment" means:

(A) Pain;

(B) Suffering;

(C) Inconvenience;

(D) Physical impairment; and

(E) Nonpecuniary damage;

(10) "Personal injury" means actual bodily harm, including pregnancy or mental anguish which is the direct result of a violent criminal act;

(11)(A) "Victim" means a person who suffers personal injury or death as a result of criminally injurious conduct committed either within the State of Arkansas or against any Arkansas resident who suffers personal injury as the result of criminally injurious conduct which occurs in states presently not having crime victims reparations programs for which the victim is eligible, and further includes any Arkansas resident who is injured or killed by an act of terrorism committed outside of the United States, as defined in 18 U.S.C. § 2331.

(B) The term "victim" shall also include a person who:

(i) Is the child, whether by blood, adoption, or marriage, of a victim as defined in subdivision (11)(A) of this section;

(ii)(*a*) Is an immediate family member of a deceased victim, a victim of sexual assault, or a child victim; or

(*b*) Is not an immediate family member, but who resided at the time of the crime in the same permanent household as a deceased victim; or

(iii) Discovered the body of a victim who died as the result of criminally injurious conduct; and

(12) "Work loss" means loss of income from work the victim or claimant would have performed if the victim had not been injured or died, reduced by any income from substitute work actually performed by the victim or claimant or by income the victim or claimant would have earned in available appropriate substitute work that he or she was capable of performing but unreasonably failed to undertake.

History. Acts 1987, No. 817, § 3; 1991, No. 396, §§ 2, 3; 1997, No. 818, §§ 1, 2; 1997, No. 887, § 1; 1999, No. 1502, §§ 1, 2; 1999, No. 1508, §§ 5, 6, 7; 2001, No. 548, § 1.

Publisher's Notes. The version of this section as amended by Acts 1997, No. 818, was repealed by Acts 1999, No. 1502, § 2 and No. 1508, § 7.

Amendments. The 2001 amendment inserted present (11)(B)(i).

CASE NOTES

Cited: Little Rock Family Planning Servs. v. Dalton, 860 F. Supp. 609 (E.D. Ark. 1994); Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 116 S. Ct. 1063, 134 L. Ed. 2d 115 (1996).

16-90-704. Penalty.

The filing of a false claim for reparations pursuant to this subchapter shall constitute a Class D felony.

History. Acts 1987, No. 817, § 19.

16-90-705. Crime Victims Reparations Board.

(a)(1) There is created a Crime Victims Reparations Board consisting of five (5) members appointed by the Governor with the advice and consent of the Senate to serve four-year staggered terms and until a successor is appointed and qualified.

(2) At least two (2) members of the board shall be persons admitted to practice law in this state.

(3) At least one (1) member of the board shall be:

(A) A victim of criminally injurious conduct;

(B) The next of kin of a homicide victim; or

(C) An individual experienced in providing victim assistance services.

(4) A vacancy shall be filled in the same manner as a regular appointment.

(b) Each year the board shall elect the chair from its membership.

(c)(1) Members of the board shall receive no pay for their services, but each member may receive expense reimbursement in accordance with § 25-16-901 et seq.

(2) All reasonable and necessary expenses of the board shall be paid from the Crime Victims Reparations Revolving Fund.

History. Acts 1987, No. 817, § 4; 1995, No. 773, § 1; 1997, No. 250, § 118.

Publisher's Notes. Acts 1987, No. 817, § 4, provided, in part, that, of the first members appointed, two shall be appointed for a term of two years, two shall be appointed for a term of three years, and one shall be appointed for a term of four years.

16-90-706. Powers of board — Logistical support.

(a)(1) The Crime Victims Reparations Board shall have:

(A) Power to award reparations for economic loss arising from criminally injurious conduct if satisfied by a preponderance of the evidence that the requirements for reparations have been met; and

(B) Authority to award the reparations to the claimant or directly to the provider of services.

(2) The board shall:

(A) Hear and determine all matters relating to claims for reparations, including having the power to reinvestigate or reopen claims without regard to statutes of limitation; and

(B)(i) Have discretion to act in a panel of three (3) or more members.

(ii) This panel may exercise the powers granted to the board.

(3) The board shall have the power to subpoena witnesses and compel their attendance, require the production of records and other evidence, administer oaths or affirmations, conduct hearings, and receive relevant evidence.

(4) The board shall be provided such office, support staff, and secretarial services as necessary by the office of the Attorney General.

(b) In addition to any other powers and duties specified elsewhere in this subchapter, the board may:

(1) Regulate its own procedure, except as otherwise provided in this subchapter;

(2) Adopt rules and regulations to implement the provisions of this subchapter;

(3) Define any term not defined in this subchapter;

(4) Prescribe forms necessary to carry out the purposes of this subchapter;

(5) Request access to any reports of investigations or other data necessary to assist the board in making a determination of eligibility for reparations under the provisions of this subchapter;

(6) Take judicial notice of general, technical, and scientific facts within its specialized knowledge; and

(7) Publicize the availability of reparations and information regarding the filing of claims for reparations.

History. Acts 1987, No. 817, §§ 5, 6.

16-90-707. Annual report by board.

(a) The Crime Victims Reparations Board shall prepare and transmit annually a report of its activities to the Governor.

(b) This report shall include the amount of reparations awarded and a statistical summary of claims and awards made and denied.

History. Acts 1987, No. 817, § 18.

16-90-708. Application forms — Cooperation by applicant.

(a) Each law enforcement agency in the state shall keep application forms prepared and provided by the Crime Victims Reparations Board and make them available to any person upon request.

(b) The board may contact any law enforcement agency to determine if an applicant has cooperated with that agency in the identification, apprehension, and conviction of the perpetrator of the crime.

History. Acts 1987, No. 817, § 7.

16-90-709. Proceedings and record — Settlement of claims.

(a)(1) Every party to the claim shall be afforded an opportunity to appear and be heard, to offer evidence and argument on any issues relevant to the claim, and to examine witnesses and offer evidence to reply to any matter of an evidentiary nature in the record relevant to the claim.

(2) A record of the proceedings of the hearing in a contested case shall be made and shall be transcribed upon request of any party, who shall pay transcription costs unless otherwise ordered by the Crime Victims Reparations Board.

(b) Without a hearing, the board may settle a claim by stipulation, agreed settlement, consent order, or default.

History. Acts 1987, No. 817, § 9.

16-90-710. Waiver of physician-patient privilege — Examinations and reports.

(a) Any person filing a claim under the provisions of this subchapter shall be deemed to have waived any physician-patient privilege as to communications or records relevant to an issue of the physical, mental, or emotional condition of the claimant.

(b)(1) If the mental, physical, or emotional condition of a claimant is material to a claim, upon good cause shown, the Crime Victims Reparations Board may order the claimant to submit to a mental or physical examination and may order an autopsy of a deceased victim.

(2) The order shall:

(A) Specify the time, place, manner, conditions, and scope of the examination or autopsy and the person by whom it is to be made; and

(B)(i) Require the person to file a detailed written report of the examination or autopsy with the board.

(ii) The report shall set out the findings of the person making the report, including results of all tests made, diagnoses, prognoses, and other conclusions and reports of earlier examinations of the same conditions.

(c) The board shall furnish to the victim a copy of any reports examined. If the victim is deceased, the board, on request, shall furnish a copy of the report to the claimant.

(d) The board may require the claimant to supply any additional medical or psychological reports available relating to the injury or death for which reparations are claimed.

History. Acts 1987, No. 817, § 10.

16-90-711. Confidential information.

When submitted to the Crime Victims Reparations Board as part of an application, the following information shall be confidential:

(1) Documents submitted by a claimant which relate to medical treatment; and

(2) Law enforcement investigative reports, if confidential under any other law.

History. Acts 1987, No. 817, § 11.

16-90-712. Conditions for reparations — Changes in awards.

(a) Reparations shall not be awarded:

(1) Unless the claim has been filed with the Crime Victims Reparations Board within one (1) year after the injury or death upon which the

claim is based, unless the board finds good cause for the failure to file a timely claim;

(2) To a claimant who was the offender or an accomplice of the offender;

(3) To another person if the award would unjustly benefit the offender or accomplice;

(4) To a victim who is injured or killed while confined in state, county, or municipal jail, prison, or other correctional facility as a result of conviction of any crime;

(5) To any claimant who has been convicted of a felony involving criminally injurious conduct;

(6) Unless the criminally injurious conduct resulting in injury or death was reported to the proper authorities within seventy-two (72) hours after its occurrence, or the board finds there was good cause for the failure to report within that time; or

(7)(A)(i) If there are insufficient funds in the Crime Victims Reparations Revolving Fund.

(ii) However, when sufficient funds become available, the awards which have not been paid shall be paid in chronological order with the oldest paid first, unless the board finds that compelling circumstances support a payment out of chronological order.

(B) Any award under this subchapter is specifically not a claim against the state if it cannot be paid due to a lack of funds in the fund.

(b) Reparations otherwise payable to a claimant shall be diminished to the extent:

(1) That the economic loss is recouped from collateral sources; or

(2) Of the degree of responsibility for the cause of the injury or death attributable to the victim, as determined by the board.

(c) Upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies, the board may deny, withdraw, or reduce an award of reparations.

(d)(1) On its own motion or on request of the claimant, the board may reconsider a decision granting or denying an award or determining its amount.

(2) An order on reconsideration of an award shall not require a refund of amounts previously paid unless the award was obtained by fraud.

(3) Reconsideration does not affect the finality of a board decision for the purpose of judicial review.

History. Acts 1987, No. 817, § 12; 1999, No. 1102, § 1.

16-90-713. Awards apart from prosecution.

(a) An award may be made whether or not any person is prosecuted or convicted.

(b) The Crime Victims Reparations Board may suspend the proceedings pending disposition of a criminal prosecution that has been

commenced or is imminent but may make a tentative award under § 16-90-716.

History. Acts 1987, No. 817, § 13.

16-90-714. Subrogation of state to claimant's rights.

(a) If reparations are awarded, the state shall be subrogated to all the rights of a claimant to receive or recover from a collateral source to the extent that reparations were awarded.

(b)(1) In the event the claimant recovers reparations, other than under the provisions of this subchapter for injuries or death resulting from criminally injurious conduct, the claimant shall retain as trustee so much of the recovered funds as necessary to reimburse the Crime Victims Reparations Revolving Fund to the extent that reparations were awarded to the claimant from that fund.

(2) The funds retained in trust shall be promptly deposited in the fund.

(c)(1) If a claimant brings an action to recover damages related to the criminally injurious conduct upon which reparations are claimed or awarded, the claimant shall give the Crime Victims Reparations Board written notice of the action.

(2) After receiving the notice, the board may join in the action as a party plaintiff to recover the reparations awarded.

(d) The board shall not require any claimant to seek or accept any collateral source contribution unless the claimant was receiving those benefits prior to the occurrence giving rise to the claim under the provisions of this subchapter.

History. Acts 1987, No. 817, §§ 8, 14.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation, 1992 Ark. L. Notes 1.

16-90-715. Action by state against convicted person for recovery of reparations.

(a)(1) Whenever any person is convicted of a crime and an order for the payment of reparations is or has been made under this subchapter for a personal injury or death resulting from the act or omission constituting the crime for which conviction was had, the Attorney General may institute a civil action against the convicted person for the recovery of all or any part of the reparations paid.

(2)(A) The suit shall be instituted in the circuit court having jurisdiction in the county in which the person resides or is found or in Pulaski County.

(B) The court shall have jurisdiction to hear, determine, and render judgment in the action.

(3)(A) Any amount recovered under this subsection shall be credited to the Crime Victims Reparations Revolving Fund.

(B) If an amount greater than that paid pursuant to the order for payment of reparations is recovered and collected in the action, the Crime Victims Reparations Board shall pay the balance to the claimant.

(b) The board shall provide the Attorney General with such information, data, and reports as he or she may require to institute actions in accordance with this section.

History. Acts 1987, No. 817, § 15.

16-90-716. Limitation on reparations — Manner of payment.

(a)(1) Reparations payable to a victim and to all other claimants sustaining economic loss because of injury to or death of that victim may not exceed ten thousand dollars ($10,000).

(2) However, for those victims whose injuries are catastrophic and result in a total and permanent disability, the maximum reparations amount shall not exceed twenty-five thousand dollars ($25,000).

(b)(1) The Crime Victims Reparations Board may provide for the payment to a claimant in a lump sum or in installments.

(2) At the request of the claimant, the board may convert future economic loss other than allowable expense to a lump sum, but only upon a finding by the board of either of the following:

(A) That the award in a lump sum will promote the interests of the claimant; or

(B) That the present value of all future economic loss other than allowable expense does not exceed one thousand dollars ($1,000).

(c) If the board determines that the claimant will suffer financial hardship unless an advance award is made, an amount may be paid to the claimant and shall be deducted from the final award or shall be repaid and recoverable from the claimant to the extent that it exceeds the final award.

(d)(1) An award payable in installments for future economic loss may be made only for a period as to which the board can reasonably determine future economic loss.

(2) An award payable in installments for future economic loss may be modified by the board upon its finding that a material and substantial change of circumstances has occurred.

(e) An award shall not be subject to execution, attachment, garnishment, or other process, except that an award for allowable expense shall not be exempt from a claim of a creditor to the extent that the creditor has provided products, services, or accommodations, the costs of which are included in the award.

(f) An assignment by the claimant to any future award under the provisions of this subchapter is unenforceable, except:

(1) An assignment of any award for work loss to assure payment of court-ordered alimony, maintenance, or child support; or

(2) An assignment of any award for allowable expense to the extent that the benefits are for the cost of products, services, or accommodations necessitated by the injury or death on which the claim is based and are provided or are to be provided by the assignee.

History. Acts 1987, No. 817, §§ 16, 17; 1999, No. 1178, § 2.

16-90-717. Crime Victims Reparations Revolving Fund.

There is created in the State Treasury a revolving fund for the Crime Victims Reparations Board to be designated the "Crime Victims Reparations Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all moneys received by the Crime Victims Reparations Board from any source including moneys applied for and received from any state, federal, or private source. All interest earned as a result of investing moneys in the Crime Victims Reparations Revolving Fund shall be paid into the fund and not into the general revenues of this state. All moneys accruing to the credit of the fund are appropriated and may be budgeted and expended by the board for the purpose of implementing the provisions of this subchapter and the provisions of the sexual assault statutes, §§ 12-12-401 — 12-12-404.

History. Acts 1987, No. 817, § 20; 1991, No. 396, § 4.

16-90-718. [Repealed.]

Publisher's Notes. This section, concerning additional assessments and the disposition of moneys, was repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The section was derived from Acts 1987, No. 817, § 21; 1991, No. 396, § 5; 1991, No. 904, §§ 11, 20.

16-90-719. Property damage — Reparations — Intent.

(a)(1) Persons who have suffered damage to their primary residence and surrounding real property in an amount in excess of five hundred dollars ($500) as a result of a criminal act or who have had personal property stolen from their primary residence valued in excess of five hundred dollars ($500), and who do not have adequate available resources or any collateral source of reimbursement, such as insurance, to cover the costs of repairs to their property may file a claim with the Crime Victims Reparations Board in the manner and form as is presently required by the Crime Victims Reparations Board for crime victims.

(2) The Crime Victims Reparations Board shall have the power to provide labor for repairs and cleanup supplied by eligible offenders serving community punishment and probationers in accordance with rules and regulations promulgated by the Board of Corrections.

(3) By this section, the Department of Community Correction is authorized and directed to promulgate necessary rules and regulations permitting the use of eligible inmates transferred to or sentenced directly to community punishment and probationers to perform the repair and cleanup work contemplated by this section and consistent with guidelines established by the Crime Victims Reparations Board.

(b) Inmates who have been convicted of violent crimes or residential burglary, even if transferred to or sentenced directly to community punishment, and probationers who have been convicted of violent crimes, residential burglary, or theft of property shall be ineligible to participate in this program, and the regulations governing this program shall reflect this prohibition.

(c)(1) The Crime Victims Reparations Board and the Board of Corrections with the cooperation and assistance of the Department of Community Correction, working in conjunction with each other, shall promulgate the necessary rules and regulations to establish a program whereby eligible inmates released to or sentenced directly to community punishment and probationers may perform labor on the primary residence and surrounding real property of victims whose primary residence has suffered damage as a result of a criminal act or whose personal property has been stolen from their primary residence, and whose owner does not have adequate available resources or any collateral source of reimbursement such as insurance to cover the costs of repairs or replacement.

(2) The safety of the victim, the probationer, and the inmate is to be given first priority in promulgating the rules and regulations.

(d)(1) Whenever a dollar amount of property damage or loss is referred to in subsections (a)-(c) of this section, the dollar amount shall refer to the fair market repair or replacement value.

(2) Further, no award shall be made under the provisions of this section for a loss based on the dollar amount of an insurance deductible which is five hundred dollars ($500) or less.

(e) It is the intent of this section to provide a method of reparations whereby victims whose primary residence is damaged or whose personal property is stolen from their primary residence as a result of criminal acts and who do not have adequate available resources or a collateral source of reimbursement such as insurance to cover the cost of repairs to their primary residence or replacement of the personal property may receive assistance in the form of inmate or probationer labor to make repairs to and clean up their primary residence and the surrounding real property.

History. Acts 1995, No. 1269, §§ 1-3.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-701 — 16-90-717 may not apply to this section which was enacted subsequently.

References to "this chapter" in §§ 16-90-803 and 16-90-804 may not apply to this section which was enacted subsequently.

Subchapter 8 — Sentencing Guidelines

SECTION.
16-90-801. Statement of sentencing policy.
16-90-802. The Arkansas Sentencing Commission.
16-90-803. Voluntary presumptive standards.
16-90-804. Departures from the standards.

A.C.R.C. Notes. Section 1 of Acts 1994 (2nd Ex. Sess.), No. 9, appropriated moneys to the Arkansas Sentencing Commission for the 1994-95 fiscal year for extra help to conduct a study of an integrated information system to enable the commission to perform research and analysis on increased parole and mandatory sentences. Section 3 of Acts 1994 (2nd Ex. Sess.), No. 9, provided: "The Arkansas Sentencing Commission shall report to the General Assembly concerning the results of its research and analysis on increased parole and mandatory sentences and their effect on the modification of existing sentencing structures and the cost of prison construction and operation."

Effective Dates. Acts 1993, Nos. 532 and 550, § 13: Mar. 16, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the sentencing policies and standards of the State of Arkansas are in need of immediate reform in order to better provide for a balanced correctional system and to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community and passage of this act is necessary to facilitate these reforms. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect, unless provided for otherwise herein, from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), Nos. 59 and 60, § 5: Aug. 26, 1994. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law which indicates the records to be used in computing criminal history scores for purposes of sentencing need to be broadened to include records of pleas of guilty and nolo contendere, and probation and suspended sentences; that the broadening of the present law will enhance the criminal penalties for criminal activity and thereby offer greater protection to the citizens of this State from the rising crime rate. Therefore an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 1170, § 13: Apr. 11, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion exists regarding the status of ineligible offenders judicially transferred to Department of Community Punishment facilities; that there is an immediate need to clarify the law applicable to transferring ineligible offenders back to the Department of Correction; and that it is in the best interest of the courts which already have crowded documents to immediately reduce the reporting requirements for departure sentences. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor

vetoed by the Governer [sic], it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2005, No. 186, § 3: July 1, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the United States Supreme Court has held that the federal sentencing guidelines are unconstitutional; that the voluntary presumptive standards of the State of Arkansas may be challenged as unconstitutional; and that this act is immediately necessary in order to confirm that the sentencing guidelines, as originally enacted, are advisory. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2005."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Procedure, 16 UALR L.J. 99.

16-90-801. Statement of sentencing policy.

(a) Purposes of Sentencing. The primary purposes of sentencing a person convicted of a crime are:

(1) To punish an offender commensurate with the nature and extent of the harm caused by the offense, taking into account factors that may diminish or increase an offender's culpability;

(2) To protect the public by restraining offenders;

(3) To provide restitution or restoration to victims of crime to the extent possible and appropriate;

(4) To assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and

(5) To deter criminal behavior and foster respect for the law.

(b) Purpose of Sentencing Standards. (1) Though voluntary, the purpose of establishing rational and consistent sentencing standards is to seek to ensure that sanctions imposed following conviction are proportional to the seriousness of the offense of conviction and the extent of the offender's criminal history.

(2) The standards seek to ensure equitable sanctions which provide that offenders similar with respect to relevant sentencing criteria will receive similar sanctions and offenders substantially different with respect to relevant sentencing criteria will receive different sanctions.

(3) Sentencing criteria should be neutral with respect to race, gender, social, and economic status.

(c) Appropriate Use of Sentencing Sanctions. (1) Rational and consistent sentencing policy requires a continuum of sanctions which increases in direct proportion to the seriousness of the offense and the extent of the offender's criminal history.

(2) Commitment to the Department of Correction is the most severe sanction and due to the finite capacity of the department's facilities, it should be reserved for those convicted of the most serious offenses, those who have longer criminal histories, and those who have repeat-

edly failed to comply with conditions imposed under less restrictive sanctions.

(3) Arkansas law provides for significant intermediate penal sanctions in the community which should be utilized when appropriate.

(4) Restrictions on an offender's liberty should only be as restrictive as necessary to fulfill the purposes of sentencing contained in this policy.

History. Acts 1993, No. 532, § 1; 1993, No. 550, § 1.

CASE NOTES

Analysis

Constitutionality.
Resentencing.
Valid purposes.

Constitutionality.

Defendant's claim that the General Assembly improperly delegated both legislative and judicial power to the Arkansas Sentencing Commission in violation of Article 4 of the Arkansas Constitution was denied because defendant failed to demonstrate that the Sentencing Guidelines Act had a prejudicial impact on him. Harmon v. State, 340 Ark. 18, 8 S.W.3d 472 (2000).

Requirement that a prosecutor approve defendant's request to plead guilty and waive a jury trial did not violate defendant's due process rights because the sentencing scheme codified at §§ 16-90-801 — 16-90-804 did not create a liberty interest in protecting from exposure to higher ranges of sentences. Whitlow v. State, 357 Ark. 290, 166 S.W.3d 45 (2004).

Resentencing.

Where original judgment was illegal and case was reversed and remanded for resentencing, trial court could consider all punishments which the court originally had available to it and could further take note of defendant's failure to comply with conditions of the first sentence. Meadows v. State, 324 Ark. 505, 922 S.W.2d 341 (1996).

Valid Purposes.

Defendant's contention that it was improper to penalize a defendant in such a way as to make a law enforcement or political statement held without merit since this section provides that a primary purpose of sentencing a person convicted of a crime is to deter criminal behavior and foster respect for the law. Love v. State, 324 Ark. 526, 922 S.W.2d 701 (1996).

Subdivision (a)(5) of this section permits juries to use a sentence to "send a message," i.e., to deter other potential criminals. Muldrew v. State, 331 Ark. 519, 963 S.W.2d 580 (1998).

16-90-802. The Arkansas Sentencing Commission.

(a) There is hereby created the Arkansas Sentencing Commission, the purpose of which is to evaluate the effect of sentencing laws, policies, and practices on the criminal justice system, to make appropriate and necessary revision to the sentencing standards, and to make recommendations to the legislature on proposed changes of sentencing laws, policies, and practices.

(b)(1) The commission shall be composed of nine (9) voting members and two (2) advisory members.

(2)(A) One (1) advisory member shall be appointed by and serve at the pleasure of the chair of the Senate Judiciary Committee.

(B) One (1) advisory member shall be appointed by and serve at the pleasure of the chair of the House Judiciary Committee.

(3) The voting members of the commission shall be composed of:

(A) Three (3) circuit judges;

(B) Two (2) prosecuting attorneys;

(C) Two (2) public defenders or private attorneys whose practices consist primarily of criminal defense work; and

(D) Two (2) private citizen members.

(c)(1)(A) The Governor shall appoint the voting members of the commission.

(B) All voting members shall serve for a term of five (5) years, unless they resign or are removed. Members shall serve until their replacements are appointed. Vacancies occurring before the expiration of a term shall be filled in the manner provided for members first appointed.

(2) The Governor shall select a chair to serve at his or her will.

(3) Members of the commission may receive expense reimbursement and stipends in accordance with § 25-16-901 et seq.

(d) In furtherance of its purpose, the commission shall have the following powers and duties:

(1)(A) The commission shall adopt an initial sentencing standards grid and an offense seriousness reference table based upon the statutory parameters and additional data and information gathered prior to January 1, 1994.

(B) The commission shall also set the percentage of time within parameters set by law to be served for offenses at each seriousness level prior to any type of transfer or release;

(2)(A) The commission shall periodically review and may revise the voluntary sentencing standards.

(B) Any revision of the standards shall be in compliance with provisions applicable to rule making contained in the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(C) Any revision of the standards shall become effective as provided by the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(D)(i) The revised standards will be in effect unless modified by the General Assembly at its next session or until revised again by the commission.

(ii) Any revisions by the commission shall be within the statutory parameters set for the various crime classes;

(3) The commission may review and make recommendations for revision of the Community Punishment Act, § 16-93-1201 et seq., target group to the General Assembly such that nonviolent offenses and offenders are routinely handled in community punishment programs;

(4)(A) The commission shall be in charge of strategic planning for a balanced correctional plan for the state.

(B) The commission shall develop such a plan in conjunction with the Board of Corrections.

(C) The commission shall monitor compliance with sentencing standards, assess their impact on the correctional resources of the

state with the assistance of the board and determine if the standards further the adopted sentencing policy goals of the state;

(5) The commission may review the classifications of crimes and sentences and make recommendations for change when supported by information that change is advisable to further the adopted sentencing policy goals of the state;

(6)(A) The commission shall develop a research and analysis system to determine the feasibility, impact on resources, and budget consequences of any proposed or existing legislation affecting sentence length.

(B) The commission shall prepare and submit to the General Assembly a report on any such legislation prior to its adoption;

(7)(A)(i) All courts having criminal jurisdiction of felony crimes shall provide to the commission in a timely manner all information deemed necessary by the commission.

(ii) Such information shall be in the form determined necessary by the commission.

(B) The commission shall have the authority to collect from any state or local governmental entity information, data in electronic or in other usable form, reports, statistics, or such other material which relates to sentencing laws, policies, and practices, or impacts on correctional resources or is necessary to carry out the commission's functions.

(C) The commission may coordinate its data collection with the Administrative Office of the Courts, the Arkansas Crime Information Center, the various circuit clerks of the state, and the various state and local correctional agencies;

(8) Pursuant to its duties outlined in this section, the commission shall be a criminal justice agency, as defined in § 12-12-1001(7), as its powers and duties include:

(A) Determining transfer eligibility;

(B) Gathering, analyzing, and disseminating criminal history information as it relates to sentencing practices, dispositions, and release criteria; and

(C) Determining the appropriate use of correctional and rehabilitative resources of the state.

(e)(1) The commission shall meet no less than quarterly.

(2)(A) The commission shall submit to the Governor, the General Assembly, and the Judicial Council a biennial report three (3) months prior to the convening of the next regularly scheduled legislative session.

(B) The report shall include a summary of the commission proceedings and recommendations for legislative and administrative action.

(f)(1) The commission shall employ an executive director from candidates presented to it by the chair.

(2) The executive director shall have appropriate training and experience to assist the commission in the performance of its duties.

(3) The executive director shall be responsible for compiling the work of the commission and drafting suggested legislation incorporating the commission's findings for submission to the General Assembly.

(g) Subject to the approval of the chair, the executive director shall employ such other staff and shall contract for services as is necessary to assist the commission in the performance of its duties, and as funds permit.

History. Acts 1993, No. 532, § 4; 1993, No. 550, § 4; 1995, No. 1170, § 6; 1997, No. 250, § 119; 2001, No. 1288, § 14.

A.C.R.C. Notes. As enacted by Acts 1993, Nos. 532 and 550, § 4, the end of subdivision (d)(1)(A) read: "the effective date of these standards, January 1, 1994."

As enacted by Acts 1993, Nos. 532 and 550, § 4, subdivision (e)(1) began: "The commission shall hold its initial meeting within forty-five (45) days of the effective date of this act and ..."

Publisher's Notes. As enacted by Acts 1993, Nos. 532 and 550, § 4, subdivision (c)(1) also provided: "The initial terms of the voting members of the Commission are to be staggered over five (5) years. Subsequently, appointment for a single member will be made in 1994, and two (2) members appointed in 1995, 1996, 1997, and 1998."

Amendments. The 2001 amendment rewrote (b)(2).

16-90-803. Voluntary presumptive standards.

(a)(1)(A) When a person charged with a felony enters a plea of guilty or nolo contendere, enters a negotiated plea, or is found guilty in a trial before the judge, or when the trial judge is authorized to fix punishment following an adjudication of guilt by a jury pursuant to § 5-4-103, sentencing may follow the procedures provided in § 16-90-804.

(B) However, these sentencing procedures do not apply to probation revocation proceedings.

(2) The presumptive sentence for any offender of a felony committed on or after January 1, 1994, may be determined by locating the appropriate cell of the sentencing standards grid.

(b) The two dimensions of the sentencing standards grid represent the primary determinants of a sentence, offense seriousness and offender history.

(1) Offense Seriousness. The offense seriousness level is determined by the offense of conviction or the offense of which the person was found guilty or to which the person pleaded guilty or nolo contendere.

(A) Felony offenses are divided into ten (10) levels of seriousness, ranging from low, seriousness level I, to high, seriousness level X.

(B) The typical cases for the offenses listed within each level of seriousness are deemed to be generally equivalent in seriousness.

(C) The most frequently occurring offenses within each seriousness level are listed on the vertical axis of the sentencing standards grid.

(D) The seriousness level for infrequently occurring offenses can be determined by consulting the offense seriousness reference table.

(E) The seriousness level for inchoate offenses is one (1) level below the level for substantive offenses.

(2) Offender History. An offender's criminal history score constitutes the horizontal axis of the sentencing standards grid.

(A) The offender's criminal history score shall be computed from the following:

(i) Prior felony records;

(ii) Prior misdemeanor records;

(iii) Prior juvenile records, under certain circumstances outlined below; and

(iv) Custody status at the time of the offense.

(B) The term "records", for the purpose of computing criminal history scores, shall include:

(i) Convictions;

(ii) Findings of guilt;

(iii) Acceptance of pleas of guilty or nolo contendere;

(iv) Instances where the defendant has been placed on probation, suspended imposition of sentence, or suspended execution of sentence;

(v) Records which have been expunged after August 31, 1994; and

(vi) Dismissals ordered after August 31, 1994, pursuant to the First Offender Act, § 16-93-301 et seq.

(C) The specific weights to be assigned to the various criteria are as follows:

(i) Weight is assigned to prior felony records according to seriousness level, as follows:

(*a*) Seriousness levels I, II, III, IV, and V = one-half (0.5) point;

(*b*) Seriousness levels VI, VII, VIII, IX, and X = one (1) point;

(ii) Weight is assigned only to Class A misdemeanors.

(*a*) Each Class A misdemeanor is worth one-quarter (0.25) point.

(*b*) No more than one (1) point may be accrued from misdemeanor records;

(iii) Weight is assigned only to judicial adjudications of delinquency for offenses for which a juvenile could have been tried as an adult and which the trial court deem relevant to sentencing in the current proceeding.

(*a*) Each adjudication is worth one-quarter (0.25) point, except for offenses adjudicated as delinquent which if committed by an adult are worth one (1) point and would have constituted:

(*1*) Capital murder, § 5-10-101;

(*2*) Murder in the first degree, § 5-10-102;

(*3*) Murder in the second degree, § 5-10-103;

(*4*) Kidnapping in the first degree, § 5-11-102;

(*5*) Aggravated robbery, § 5-12-103;

(*6*) Rape, § 5-14-103; or

(*7*) Battery in the first degree, § 5-13-201.

(*b*)(*1*) No more than one (1) point may be accrued from juvenile offenses unless one (1) of the offenses adjudicated as delinquent would have constituted, if committed by an adult:

(*A*) Capital murder, § 5-10-101;

(*B*) Murder in the first degree, § 5-10-102;
(*C*) Murder in the second degree, § 5-10-103;
(*D*) Kidnapping in the first degree, § 5-11-102;
(*E*) Aggravated robbery, § 5-12-103;
(*F*) Rape, § 5-14-103; or
(*G*) Battery in the first degree, § 5-13-201.

(*2*) An offender may receive no more than two (2) points for juvenile offenses;

(iv) One (1) point is to be added to an offender's score if the offender is under any type of criminal justice restraint for a felony offense at the time that he or she committed the crime for which he or she is being sentenced. Such restraint includes pretrial bond, suspended imposition of sentence, probation, parole, postprison supervision, and release pending sentencing for a prior crime;

(v)(*a*) Juvenile offenses must have occurred within ten (10) years of the time of the offense for which an offender is being currently sentenced.

(*b*) Misdemeanor offenses must have occurred within ten (10) years of the time of the offense for which an offender is currently being sentenced.

(*c*) Felony offenses at seriousness levels I-V will not be counted if a period of fifteen (15) years has elapsed since the date of discharge from or expiration of the sentence to the date of the current offense; and

(vi) When multiple sentences for a single course of conduct were imposed, only the offense at the highest seriousness level is considered.

(3)(A)(i) The offense of conviction determines the appropriate seriousness level on the vertical axis.

(ii) The offender's criminal history score determines the appropriate location on the horizontal axis.

(B) The presumptive fixed sentence for a felony conviction is found in the sentencing standards grid cell at the intersection of the column defined by the criminal history score and the row defined by the offense seriousness level.

(C) The statutory minimum or maximum ranges for a particular crime shall govern over a presumptive sentence if the presumptive sentence should fall below or above such ranges.

(4) This section shall not apply when a jury has recommended a sentence to the trial judge.

(5) Capital murder is excluded from the sentencing standards and is subject to the procedures in § 5-4-601 et seq.

(c) For all arrests or offenses occurring before July 1, 2005, that have not reached a final disposition as to judgment in the trial court, sentencing shall be in accordance with the law in effect at the time the offense occurred and not under the provisions of this section.

History. Acts 1993, No. 532, § 2; 1993, No. 550, § 2; 1994 (2nd Ex. Sess.), No. 59, § 1; 1994 (2nd Ex. Sess.), No. 60, § 1; 1995, No. 1170, § 7; 2001, No. 1179, § 1; 2005, No. 186, § 1.

Amendments. The 2001 amendment redesignated former (a)(1) as present (a)(1)(A); and added (a)(1)(B).

The 2005 amendment substituted "sentencing may" for "sentencing shall" in (a)(1)(A); deleted former (a)(2); redesignated former (a)(3) as present (a)(2); substituted "may be determined" for "is determined" in present (a)(2); and added (c).

CASE NOTES

Analysis

Constitutionality.
Construction.
Applicability.
Guilty plea.
Probation revocation.

Constitutionality.

This section does not create presumptive sentencing standards that are violative under the due process and equal protection clauses, notwithstanding the contention that the statute creates two classes of defendants, one whose punishment is determined by a jury and one whose punishment is determined by the trial judge, and encourages defendants to waive their right to a jury trial, since a trial judge is not required to impose the presumptive sentence and has authority to depart from the presumptive sentence. Hutcherson v. State, 74 Ark. App. 72, 47 S.W.3d 267 (2001).

Construction.

Because this section, although enacted at a later date, contains no repealing clause and does not conflict with § 5-4-501, the state has the option of alleging specific habitual status in the information or simply charging the underlying offense. Mackey v. State, 56 Ark. App. 164, 939 S.W.2d 851 (1997), reversed on other grounds by 329 Ark. 229, 947 S.W.2d 359 (1997).

Applicability.

The trial court did not err when it failed to sentence the defendant in a prosecution for manslaughter according to the sentencing guidelines promulgated in the statute where the jury's recommended sentence fell clearly within the statutory range for a Class C felony, such as manslaughter. Hagar v. State, 341 Ark. 633, 19 S.W.3d 16 (2000).

Defendant's sentence was not illegal on its face, even though she was given a sentence greater than the presumed one, because her sentence was authorized pursuant to the statute governing sentencing for habitual offenders, § 5-4-501; the statutory range for a habitual offender with four or more felony convictions convicted of a Class C felony was between three and 30 years and, since defendant's 20 year sentence fell squarely within this range, the trial court was authorized to impose it. Brown v. State, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

Defendant was properly given non-presumptive sentences for his convictions for second degree domestic battery and third degree domestic battery because the trial court was authorized to depart from the presumptive sentence pursuant to its written findings as to the severity of the victim's injuries; further, the sentencing procedure did not violate defendant's Sixth Amendment rights because a jury did not find the facts on which his non-presumptive sentence was based, the sentence was still within the statutory range, and defendant waived his right to a jury trial and consented to judicial sentencing. Brock v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 198 (Mar. 2, 2005).

Guilty Plea.

Issues such as the trial court's upward departure from the sentencing guidelines contained in this section and § 16-90-804 are not appealable after an ARCrP 24.3(b) conditional guilty plea. Wofford v. State, 330 Ark. 8, 952 S.W.2d 646 (1997).

Probation Revocation.

The presumptive sentencing standards apply in probation revocation proceedings. Martin v. State, 337 Ark. 451, 989 S.W.2d 908 (1999).

Cited: Cupit v. State, 324 Ark. 438, 920 S.W.2d 852 (1996); Lockhart v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 707 (Nov. 10, 2005).

16-90-804. Departures from the standards.

(a) The trial court may deviate from the presumptive sentence without providing a written justification.

(b)(1)(A) When sentencing is done by the judge following the entry of a plea of guilty or nolo contendere or a trial before the judge, either party or both parties may present evidence to justify a departure.

(B) The judge may allow argument if he or she finds that it would be helpful.

(2)(A) If both sides agree on a recommended sentence, the judge may choose to accept or reject the agreement based upon the facts of the case and whether those facts support the presumptive sentence or a departure different from any recommendation.

(B) If there is an agreed departure from the presumptive sentence, written reasons shall be supplied by the parties to the court to attach to the commitment and to forward to the Arkansas Sentencing Commission.

(C) If the judge rejects the agreement, the defendant shall be allowed to withdraw his or her plea.

(c) The following is a nonexclusive list of factors which may be considered as reasons for departure:

(1) Mitigating factors. (A) While falling short of a defense, the victim played an aggressive role in the incident or provoked or willingly participated in it;

(B)(i) While falling short of a defense, the victim played an aggressive role in the incident or provoked or willingly participated in it;

(ii) Voluntary use of drugs or alcohol does not fall within this factor;

(C) The offender played a minor or passive role in the crime;

(D) Before detection, the offender compensated or made a good faith effort to compensate the victim for any damage or injury sustained;

(E) The offense was principally accomplished by another person, and the offender manifested extreme caution or sincere concern for the safety or well-being of the victim;

(F) The offender or the offender's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense, and the offense is a response to that abuse;

(G) The operation of the multiple offense policy results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter;

(H) Before detection in sexual offenses, the offender has voluntarily admitted the nature and extent of the sexual offense and has sought and participated in professional treatment or counseling for such offenses; or

(I) Upon motion of the state stating that the defendant has made a good faith effort to provide substantial assistance to the investiga-

tion or prosecution of another person who has committed an offense, the circumstances listed below may be weighed as mitigating factors with respect to the defendant's offense:

(i) The timeliness of the defendant's assistance;

(ii) The nature and extent of the defendant's assistance;

(iii) The truthfulness, completeness, and demonstrable reliability of any information or testimony provided by the defendant; and

(2) AGGRAVATING FACTORS. (A) The offender's conduct during the commission of the current offense manifested deliberate cruelty to the victim exhibited by degrading, gratuitous, vicious, torturous, and demeaning physical or verbal abuse, unusual pain, or violence in excess of that necessary to accomplish the criminal purpose;

(B) The offender knew or should have known that the victim was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health;

(C) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. This factor does not apply if it constitutes an element of the crime; or

(v) The defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions;

(D) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two (2) or more of the circumstances listed below is an aggravating factor with respect to the offense:

(i) The offense involved at least three (3) separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The offense involved an attempted or actual sale or transfer of controlled substances in amounts substantially larger than the statutory minimum which defines the offense;

(iii) The offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement;

(iv) The circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or

fiduciary relationships, e.g., a pharmacist, physician, or other medical professional; or

(vi) The offender has received substantial income or resources from his or her involvement in drug trafficking;

(E) The offender employed a firearm in the course of or in furtherance of the felony or in immediate flight therefrom. This factor does not apply to an offender convicted of a felony, an element of which is:

(i) Employing or using, or threatening or attempting to employ or use, a deadly weapon;

(ii) Being armed with a deadly weapon;

(iii) Possessing a deadly weapon;

(iv) Furnishing a deadly weapon; or

(v) Carrying a deadly weapon;

(F) The offense was a sexual offense and was part of a pattern of criminal behavior with the same or different victims under the age of eighteen (18) years of age manifested by multiple incidents over a prolonged period of time;

(G) The operation of the multiple offense policy results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter;

(H) The offense was committed in a manner that exposed risk of injury to individuals other than the victim or victims, e.g., shooting into a crowd;

(I) The offense was a violent or sexual offense committed in the victim's zone of privacy, e.g., his or her home or the curtilage thereof;

(J) The offender attempts to cover the offense by intimidation of witnesses, destruction or tampering with evidence, or purposely misleading authorities;

(K) The offense was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody; or

(L) In offenses related to vehicular homicides, the offender does not have the minimum insurance required by law.

(d) This section shall not apply when a jury has recommended a sentence to the trial judge.

(e)(1) For all arrests or offenses occurring before July 1, 2005, that have not reached a final disposition as to judgment in court, sentencing should follow the law in effect at the time the offense occurred.

(2) Any defendant is subject to the sentencing guidelines in effect at that time and not under the provisions of this section.

History. Acts 1993, No. 532, § 3; 1993, No. 550, § 3; 1995, No. 1170, §§ 8, 9; 2005, No. 186, § 1.

Amendments. The 2005 amendment rewrote (a); inserted "or she" in present (b)(1)(B); deleted former (c); redesignated former (d) and (e) as present (c) and (d); substituted "considered" for "used" in present (c); and added present (e).

RESEARCH REFERENCES

ALR. Downward departure under state sentencing guidelines based on extraordinary family circumstances. 106 ALR 5th 377.

Ark. L. Rev. Recent Developments, Sentencing, 57 Ark. L. Rev. 697.

CASE NOTES

Analysis

Construction.
Compliance.
Factors for departure.
Guilty plea.
Statutory minimum.

Construction.

Mere fact that trial court failed to provide written justification did not render defendant's sentence illegal on its face; subdivision (c)(1) provided that, when the trial court imposed a sentence that was outside the presumptive range and was not accompanied by written justification, defendant was entitled to consideration for any discretionary release applicable under the law as if he had received the presumptive sentence, and the transfer or releasing authority may review, grant, or deny transfer or release based on any eligibility established by the presumptive sentence term. Brown v. State, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

Defendant was properly given non-presumptive sentences for his convictions for second degree domestic battery and third degree domestic battery because the trial court was authorized to depart from the presumptive sentence pursuant to its written findings as to the severity of the victim's injuries; further, the sentencing procedure did not violate defendant's Sixth Amendment rights because a jury did not find the facts on which his non-presumptive sentence was based, the sentence was still within the statutory range, and defendant waived his right to a jury trial and consented to judicial sentencing. Brock v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 198 (Mar. 2, 2005).

This section clearly indicates that the list of departure factors is not exclusive; therefore, evidence of subsequent drug manufacturing was admissible in the sentencing phase of a drug trial because it was relevant for departure purposes. Crawford v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 292 (May 12, 2005).

Compliance.

The General Assembly did not intend that the trial court necessarily write out the reasons for departure from the sentencing grid in longhand but only that the reasons be written; thus, where they were in writing, and the trial court circled the numbers of those aggravating circumstances that compromised its justifications, this procedure was appropriate and did not constitute error. Woods v. State, 323 Ark. 605, 916 S.W.2d 728 (1996).

Factors for Departure.

While "committing additional felonies while on probation" is not on the list of aggravating factors provided by the statute, it is an appropriate reason when the sentence follows a probation revocation proceeding and the preponderance of the evidence indicates that the defendant committed other felonies during his probation. Martin v. State, 337 Ark. 451, 989 S.W.2d 908 (1999).

Guilty Plea.

Issues such as the trial court's upward departure from the sentencing guidelines contained in this section and § 16-90-803 are not appealable after an ARCrP 24.3(b) conditional guilty plea. Wofford v. State, 330 Ark. 8, 952 S.W.2d 646 (1997).

Statutory Minimum.

This section does not allow a judge to sentence a defendant to a fifty-four month sentence when the statutory minimum is ten years. Pickett v. State, 321 Ark. 224, 902 S.W.2d 208 (1995).

Cited: Cupit v. State, 324 Ark. 438, 920 S.W.2d 852 (1996); Ladwig v. State, 328 Ark. 241, 943 S.W.2d 571 (1997); Johnson v. State, 328 Ark. 526, 944 S.W.2d 115 (1997); Lockhart v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 707 (Nov. 10, 2005).

Subchapter 9 — Expungement and Sealing of Criminal Records

SECTION.
16-90-901. Definition.
16-90-902. Effect of expungement.
16-90-903. Release of sealed records.
16-90-904. Procedure for sealing of records.
16-90-905. Uniform petition and order to seal records.
16-90-906. When no guilty verdict.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-901 to 16-90-905 may not apply to § 16-90-906 which was enacted subsequently.

16-90-901. Definition.

(a)(1) As used in §§ 5-64-407, 5-4-311, 16-90-601, 16-90-602, 16-90-605, 16-93-301 — 16-93-303, and 16-93-1207, "expunge" shall mean that the record or records in question shall be sealed, sequestered, and treated as confidential in accordance with the procedures established by this subchapter.

(2) Unless otherwise provided by this subchapter, "expunge" shall not mean the physical destruction of any records.

(3) No person who is found guilty of or pleads guilty or nolo contendere to a sexual offense as defined in this section and in which the victim was under the age of eighteen (18) years shall be eligible to have the offense expunged under the procedures set forth in this subchapter.

(b) For purposes of this subchapter, "sexual offense" shall be defined as conduct prohibited by § 5-14-101 et seq., §§ 5-26-202, 5-27-602, 5-27-603, 5-27-605, 16-93-303(a)(1)(B), and any other subsequently enacted criminal law prohibiting sexual conduct with a child.

History. Acts 1995, No. 998, § 7; 1999, No. 1407, § 3; 2003, No. 1390, § 7; 2003, No. 1753, § 1.

Publisher's Notes. Section 5-64-407, referred to in (a)(1), no longer relates to the expungement of records. Acts 2005, No. 1994, § 304[B], rewrote the section.

Amendments. The 2003 amendment by No. 1390 substituted "§ 5-14-101 et seq." for "§§ 5-14-103, 5-14-108, 5-14-110, 5-14-120, and 5-14-121" in (b).

The 2003 amendment by No. 1753, in (b), substituted "§ 5-14-101 et seq., §§ 5-26-202, 5-27-602, 5-27-603, 5-27-605, 16-93-303(a)(1)(B), and any other subsequently enacted criminal law prohibiting sexual conduct with a child" for "§§ 5-14-103, 5-14-108, 5-14-110, 5-14-120, and 5-14-121."

CASE NOTES

Juvenile Offenses.

Where the appellant was adjudicated delinquent of an offense for which he could have been charged as an adult, the specific expungement provisions contained in § 9-27-309 controlled over the more general provisions for expungement of criminal records found in § 16-90-901 and the sections enumerated therein. L.H. v. State, 333 Ark. 613, 973 S.W.2d 477 (1998).

16-90-902. Effect of expungement.

(a) An individual whose record has been expunged in accordance with the procedures established by this subchapter shall have all privileges and rights restored and shall be completely exonerated, and the record which has been expunged shall not affect any of his or her civil rights or liberties unless otherwise specifically provided by law.

(b) Upon the entry of the uniform order to seal records of an individual, the individual's underlying conduct shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist.

History. Acts 1995, No. 998, § 7.

CASE NOTES

In General.

Where defendant failed to prove that his 1994 conviction was expunged in accordance with this section, the trial court did not err in admitting the conviction into evidence in his current trial for sexual assault. Davidson v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 416 (June 23, 2005).

16-90-903. Release of sealed records.

(a) The custodian of the records shall not disclose the existence of such records or release such records except when requested by:

(1) The individual whose records were sealed or the individual's attorney, authorized in writing by the individual;

(2) A criminal justice agency, as defined in § 12-12-1001, and the request is accompanied by a statement that the request is being made in conjunction with an application for employment with such agency by the individual whose record has been sealed;

(3) A court, upon a showing of a subsequent adjudication of guilt of the individual whose record has been sealed;

(4) A prosecuting attorney, and such request is accompanied by a statement that the request is being made in conjunction with the prosecution of an offense; or

(5) The Arkansas Crime Information Center.

(b)(1) As used in this section, "custodian" shall not mean the Arkansas Crime Information Center.

(2) Access to data maintained by the Arkansas Crime Information Center shall continue to be governed by § 12-12-1001 et seq.

History. Acts 1995, No. 998, § 7.

16-90-904. Procedure for sealing of records.

(a) Any individual who is eligible to have an offense expunged may file a uniform petition to seal records, as described in § 16-90-905, with the circuit court in the county where the crime was committed.

(b)(1) A copy of the uniform petition for sealing of the record shall be served upon the prosecuting authority for the county in which the petition is filed and upon the arresting agency. However, it shall not be necessary to make any agency a party to the action.

(2)(A) Any person desiring to oppose the sealing of the record shall file a notice of opposition with the court setting forth reasons within thirty (30) days after receipt of the uniform petition or after the uniform petition is filed, whichever is the later date.

(B) If no opposition is filed, the court may grant the petition.

(C) If notice of opposition is filed, the court shall set the matter for a hearing.

(c) If the court determines that the record should be sealed, the uniform order, as described in § 16-90-905, shall be entered and filed with the circuit clerk.

(d) The clerk of the court shall certify copies of the uniform order to the prosecuting attorney who filed the underlying charges, the arresting agency, the Administrative Office of the Courts, and the Arkansas Crime Information Center.

(e)(1) The circuit clerk shall remove all petitions, orders, docket sheets, and documents relating to the case, place them in a file, and sequester them in a separate and confidential holding area within the clerk's office.

(2)(A) A docket sheet shall be prepared to replace the sealed docket sheet.

(B) The replacement docket sheet shall contain the docket number, a statement that the case has been sealed, and the date that the order to seal the record was issued.

(3) All indices to the file of the individual with a sealed record shall be maintained in a manner to prevent general access to the identification of the individual.

(f) Upon notification of an order to seal records, all circuit clerks, arresting agencies, and other criminal justice agencies maintaining such conviction records in a computer-generated database shall either segregate the entire record into a separate file or ensure by other electronic means that the sealed record shall not be available for general access unless otherwise authorized by law.

History. Acts 1995, No. 998, § 7.

16-90-905. Uniform petition and order to seal records.

(a)(1) The Arkansas Crime Information Center shall adopt and provide a uniform petition and order to seal records that shall be used by all petitioners and by all circuit and district courts in this state.

(2) No order to seal or expunge records covered by this subchapter shall be effective unless the uniform order is entered.

(3)(A) The petition shall include a statement verified under oath indicating whether the petitioner has felony charges pending in any state or federal court and the status of those charges.

(B) The petition shall also include a statement that the information contained in the petition is true and correct to the best of the petitioner's knowledge, and the order shall contain, at a minimum, the following data elements:

(i) The person's full name, race, sex, and date of birth;

(ii) The person's full name at the time of arrest and adjudication of guilt, if different from the person's current name;

(iii) The crimes for which the person was adjudicated guilty and the date of the disposition;

(iv) The identity of the court;

(v) The provision under which the individual was sentenced that provides for sealing or expungement of the record; and

(vi) The specific records to be sealed.

(b)(1) If no record exists in the state central repository of the arrest for the charges in the petition, a record shall be established before the uniform order to seal becomes effective.

(2) When no record exists in the state central repository, it shall be the duty of the petitioner and the original arresting agency to submit fingerprint cards on the petitioner, according to § 12-12-1006 and procedures established by the Arkansas Crime Information Center.

History. Acts 1995, No. 998, § 7; 2003, No. 839, § 1.

Amendments. The 2003 amendment redesignated former (3) through (3)(F) as present (3)(A) through (3)(B)(vi); inserted "verified under oath, indicating whether the petitioner has felony charges pending in any state or federal court and the status of those charges" in present (3)(A); added "The petition shall also include a statement" in present (3)(B); and made related changes.

Cross References. Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Expungement Petitions, 26 UALR L.J. 446.

CASE NOTES

In General.

The legislature did not intend to mandate that all petitioners file a uniform petition for expungement before the circuit court may grant the requested relief; expungement may be granted based upon a petition that substantially complies with the requirements of this section, so long as the order granting expungement contains the particular information listed in subsection (a)(3) of this section. Fulmer v. State, 337 Ark. 177, 987 S.W.2d 700 (1999).

16-90-906. When no guilty verdict.

Any individual who has been charged and arrested for any criminal offense where the charges are subsequently nolle prossed or dismissed or the individual is acquitted at trial is eligible to have all arrest records, petitions, orders, docket sheets, and any other documents relating to the case expunged in accordance with the procedures defined

by this subchapter and upon entry of an order of expungement may state that no such charges, arrest, and the resulting trial ever occurred.

History. Acts 1997, No. 738, § 1.

A.C.R.C. Notes. References to "this subchapter" in §§ 16-90-901 to 16-90-905 may not apply to this section which was enacted subsequently.

References to "this chapter" in §§ 16-90-803 and 16-90-804 may not apply to this section which was enacted subsequently.

CASE NOTES

Cited: Sundeen v. Kroger, 355 Ark. 138, 133 S.W.3d 393 (2003).

Subchapter 10 — Local Crime Stoppers Programs

SECTION.
16-90-1001. Definitions.
16-90-1002. Duties.
16-90-1003. Certification of local programs.
16-90-1004. Confidentiality of board records.
16-90-1005. Privileged information.
16-90-1006. Misuse of information.
16-90-1007. Repayment of rewards.
16-90-1008. Payments from probationers.
16-90-1009. [Repealed.]

A.C.R.C. Notes. References to "this chapter" in §§ 16-90-803 and 16-90-804 may not apply to this subchapter which was enacted subsequently.

16-90-1001. Definitions.

As used in this subchapter:

(1) "Board" means the Crime Victims Reparations Board created by § 16-90-705;

(2) "Crime stoppers organization" means a private, nonprofit organization that is operated on a local or statewide level, that accepts and expends donations for rewards to persons who report to the organization information about criminal activity, and that forwards the information to the appropriate law enforcement agency; and

(3) "Local crime stoppers program" means the acceptance and spending of donations by a private, nonprofit organization for rewards to persons who report information concerning criminal activity to the organization, if the organization:

(A) Operates less than statewide; and

(B) Forwards reported information to the appropriate law enforcement agency.

History. Acts 1995, No. 1300, § 1.

16-90-1002. Duties.

(a) The Crime Victims Reparations Board shall:

(1) Advise and assist in the creation of local crime stoppers programs;

(2) Foster the detection of crime and encourage persons to report information about criminal acts;

(3) Encourage news and other media to promote local crime stoppers programs and to inform the public of the functions of the board;

(4) Assist local crime stoppers programs in forwarding information about criminal acts to the appropriate law enforcement agencies;

(5) Help law enforcement agencies detect and combat crime by increasing the flow of information to and between law enforcement agencies; and

(6) Adopt necessary rules and regulations necessary to carry out its functions under this subchapter.

(b) The office of the Attorney General shall provide the board such office space, support staff, and secretarial services as may be necessary for the administration of this subchapter.

History. Acts 1995, No. 1300, § 2.

16-90-1003. Certification of local programs.

(a)(1) The Crime Victims Reparations Board shall, at the request of a judge, determine whether a local crime stoppers program is qualified to receive repayments of rewards.

(2) The board shall approve a local crime stoppers program to receive those repayments if, considering the organization, continuity, leadership, community support, and general conduct of the program, the board determines that the repayments will be spent to further the crime prevention purposes of the program.

(b) Each local crime stoppers program certified by the board to receive payments is subject to an annual audit by an independent accounting firm and must submit the audit to the board for review.

History. Acts 1995, No. 1300, § 6.

16-90-1004. Confidentiality of board records.

The Crime Victims Reparations Board records relating to reports of criminal acts are confidential.

History. Acts 1995, No. 1300, § 3.

16-90-1005. Privileged information.

(a) Evidence of a communication between a person submitting a report of a criminal act to the Crime Victims Reparation Board or a local crime stoppers program and the person who accepted the report on

behalf of the board or local crime stoppers program is not admissible in court or an administrative proceeding.

(b) Records of the board or a local crime stoppers program concerning a report of criminal activity may not be compelled to be produced before a court or other tribunal except on the order of the Arkansas Supreme Court.

History. Acts 1995, No. 1300, § 4.

16-90-1006. Misuse of information.

(a) A person who is a member or employee of the Crime Victims Reparation Board or who accepts the report of criminal activity on behalf of a local crime stoppers program commits an offense if the person intentionally or knowingly divulges to a person not employed by a law enforcement agency the content of a report of a criminal act or the identity of the person who made the report without the consent of the person who made the report.

(b) An offense under this section is a Class A misdemeanor.

History. Acts 1995, No. 1300, § 5.

16-90-1007. Repayment of rewards.

(a) After a defendant has been convicted of a felony offense, the judge may order the defendant to repay all or part of a reward paid by a local crime stoppers program.

(b) In determining whether the defendant must repay the reward or part of the reward, the court shall consider:

(1) The ability of the defendant to make the payment and the financial hardship on the defendant to make the required payment; and

(2) The importance of the information to the prosecution of the defendant as provided by the arresting officer or the attorney for the state with due regard for the confidentiality of the local crime stoppers program's records.

(c)(1) If a judge orders a defendant to repay a reward or part of a reward, the court shall assess this cost against the defendant in the same manner as other costs of prosecution are assessed against a defendant.

(2) The court may order the defendant to:

(A) Pay the entire amount required when sentence is pronounced;

(B) Pay the entire amount required at a later date specified by the court; or

(C) Pay specified portions of the required amount at designated intervals.

(d) If a judge orders a defendant to repay a reward or part of a reward, a statement of the amount of the payment or payments required to be made shall be included in the judgment.

(e) After receiving a payment from a person ordered to make the payment under this section, the circuit clerk shall:

(1) Make a record of the payment;
(2) Deduct a one-time five dollar ($5.00) processing fee from the reward repayment;
(3) Forward the payment to the designated local crime stoppers program; and
(4) Make a record of the payment's being forwarded.

History. Acts 1995, No. 1300, § 8.

16-90-1008. Payments from probationers.

(a) A court may not order a probationer to make any payments as a term and condition of probation, except for fines, court costs, restitution of the victim, payment to a local crime stoppers program under subsection (b) of this section, and other terms and conditions expressly authorized by statute.
(b)(1) In addition to any other terms and conditions imposed under this section, the court may require the probationer as a condition of his or her probation to make one (1) payment in any amount not to exceed fifty dollars ($50) to a local crime stoppers program and as certified by the Crime Victims Reparations Board.
(2) In imposing the condition, the court shall consider the ability of the probationer to make the payment and the effectiveness and fiscal responsibility of the local crime stoppers program.
(c)(1) A local crime stoppers program that receives a payment from a probationer may not use the payment for any purpose other than the payment of a reward to a person who reports information concerning criminal activity.
(2) No later than January 15 of each year, a local crime stoppers program that receives or expends money under this section shall file a detailed report with the Adult Probation Office of the Department of Community Correction that accounts for all money received and expended under this section during the preceding calendar year.

History. Acts 1995, No. 1300, § 7.

16-90-1009. [Repealed.]

Publisher's Notes. This section, concerning court costs and the Crime Stoppers Assistance Fund, was repealed by Acts 1995, No. 1256, § 21, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 5. The section was derived from Acts 1995, No. 1300, § 9.

Subchapter 11 — Rights of Victims of Crime

SECTION.
16-90-1101. Definitions.
16-90-1102. Compliance with subchapter.
16-90-1103. Presence at court proceedings.
16-90-1104. Nondisclosure of information about victim.
16-90-1105. Limitations on employer.
16-90-1106. Prompt return of property.

SECTION.
16-90-1107. Information from law enforcement agencies.
16-90-1108. Information concerning appeal or post-conviction remedies.
16-90-1109. Information concerning confinement.
16-90-1110. General requirements for information.
16-90-1111. Presentence report.
16-90-1112. Victim impact statement.
16-90-1113. Consideration of victim impact statement at parole hearing.
16-90-1114. Derivative rights of member of victim's family.
16-90-1115. Duty to provide information or notice.

A.C.R.C. Notes. References to "this chapter" in §§ 16-90-803 and 16-90-804 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1997, No. 1262, § 18: January 1, 1998.

16-90-1101. Definitions.

In this subchapter:

(1) "Crime" means an act or omission committed by a person, whether or not competent or an adult, which is punishable by incarceration if committed by a competent adult;

(2) "Member of the victim's family" means the spouse, a child by birth or adoption, a stepchild, a parent, a stepparent, a sibling, or an individual designated by the victim or by a court in which the crime is being or could be prosecuted, but does not include an individual who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan;

(3) "Offense against a victim who is a minor" means:

(A) Kidnapping pursuant to § 5-11-102(a)(4) when the victim is a minor and the offender is not the parent of the victim;

(B) False imprisonment in the first degree pursuant to § 5-11-103 when the victim is a minor and the offender is not the parent of the victim;

(C) Permanent detention or restraint pursuant to § 5-11-106 when the victim is a minor and the offender is not the parent of the victim;

(D) Any sex offense when the victim is a minor;

(E) An attempt, solicitation, or conspiracy to commit any of the offenses enumerated in this subdivision (3);

(F) An adjudication of guilt for an offense of the law of another state, for a federal offense, or for a military offense, which is substantially equivalent to any of the offenses enumerated in this subdivision (3); or

(G) A violation of any former law of this state that is substantially equivalent to any of the offenses enumerated in this subdivision (3);

(4) "Person" means an individual, corporation, estate, trust, partnership, association, joint venture, governmental entity, agency, or instrumentality, or any other legal entity;

(5) "Representative of the victim" means a member of the victim's family or an individual designated by the victim or by a court in which the crime is being or could be prosecuted;

(6) "Sex offense" means:

(A) Rape, § 5-14-103;

(B) Sexual indecency with a child, § 5-14-110;

(C) Sexual assault in the first degree, § 5-14-124;

(D) Sexual assault in the second degree, § 5-14-125;

(E) Sexual assault in the third degree, § 5-14-126;

(F) Sexual assault in the fourth degree, § 5-14-127;

(G) Incest, § 5-26-202;

(H) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;

(I) Transportation of minors for prohibited sexual conduct, § 5-27-305;

(J) Employing or consenting to use of a child in sexual performance, § 5-27-402;

(K) Producing, directing, or promoting a sexual performance, § 5-27-403;

(L) Promoting prostitution in the first degree, § 5-70-104;

(M) Stalking, § 5-71-229;

(N) An attempt, solicitation, or conspiracy to commit any of the offenses enumerated in this subdivision (6);

(O) An adjudication of guilt for an offense of the law of another state, for a federal offense, or for a military offense, which is substantially equivalent to any of the offenses enumerated in this subdivision (6);

(P) Computer child pornography, § 5-27-603;

(Q) Computer exploitation of a child in the first degree, § 5-27-605(a); or

(R) A violation of any former law of this state that is substantially equivalent to any of the offenses enumerated in this subdivision (6);

(7) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States;

(8) "Victim" means a victim of a sex offense or an offense against a victim who is a minor and a victim of any violent crime, but does not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan and does not include a governmental entity; and

(9) "Violent crime" means any felony which resulted in physical injury to the victim, any felony involving the use of a deadly weapon, terroristic threatening in the first degree, § 5-13-301(a), and stalking, as defined in § 5-71-229.

History. Acts 1997, No. 1262, § 1; 2003, No. 1087, § 13; 2003, No. 1390, § 8.

Amendments. The 2003 amendment by No. 1087 inserted present (6)(P) and (Q).

The 2003 amendment by No. 1390 rewrote (6).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Criminal Law, Computer Crimes, 26 UALR L.J. 361.

16-90-1102. Compliance with subchapter.

Failure to comply with this subchapter does not create a claim for damages against a government employee, official, or entity.

History. Acts 1997, No. 1262, § 2.

16-90-1103. Presence at court proceedings.

(a) The victim or a representative of the victim may be present whenever the defendant has a right to be present during a court proceeding concerning the crime charged, other than a grand jury proceeding, unless the court determines that exclusion of the victim or the victim's representative is necessary to protect the defendant's right to a fair trial or the confidentiality or fairness of a juvenile proceeding.

(b) If the victim is present, the court, at the victim's request, shall permit the presence of an individual to provide support to the victim, unless the court determines that exclusion of the individual is necessary to protect the defendant's right to a fair trial.

History. Acts 1997, No. 1262, § 4.

16-90-1104. Nondisclosure of information about victim.

(a) A court may not compel a victim or a member of the victim's family testifying in a criminal justice proceeding to disclose a residential address or place of employment on the record in open court unless the court finds that disclosure of the information is necessary.

(b) A law enforcement agency shall not disclose to the public information directly or indirectly identifying the victim of a sex crime except to the extent that disclosure is:

(1) Of the site of the crime;

(2) Required by law;

(3) Necessary for law enforcement purposes; or

(4) Permitted by the court for good cause.

History. Acts 1997, No. 1262, § 3.

16-90-1105. Limitations on employer.

An employer may not discharge or discipline a victim or a representative of the victim for:

(1) Participation at the prosecuting attorney's request in preparation for a criminal justice proceeding; or

(2) Attendance at a criminal justice proceeding if the attendance is reasonably necessary to protect the interests of the victim.

History. Acts 1997, No. 1262, § 6.

16-90-1106. Prompt return of property.

(a) Any person holding property of a victim shall take reasonable care of the property.

(b) The responsible official shall promptly return the property to the victim when it is no longer needed for evidentiary purposes, unless it is contraband or subject to forfeiture.

History. Acts 1997, No. 1262, § 5.

16-90-1107. Information from law enforcement agencies.

(a) After initial contact between a victim and a law enforcement agency responsible for investigating a crime, the agency shall promptly give in writing to the victim:

(1) An explanation of the victim's rights under this subchapter; and

(2) Information concerning the availability of:

(A) Assistance to victims, including medical, housing, counseling, financial, social, legal, and emergency services;

(B) Compensation for victims under the Arkansas Crime Victims Reparations Act, § 16-90-701 et seq., and the name, street address, and telephone number of the agency to contact;

(C) Protection of the victim, including protective court orders; and

(D) Access by the victim and the defendant to public records related to the case.

(b) As soon as practicable, the law enforcement agency shall give to the victim, as relevant, the following:

(1) Information as to the suspect's identity, unless inconsistent with law enforcement purposes;

(2) Information as to whether the suspect has been taken into custody, has escaped, or has been released, and any conditions imposed on the release when such information has been made known to the law enforcement agency;

(3) The file number of the case and the name, office address, and office telephone number of a law enforcement officer assigned to investigate the case; and

(4) The prosecuting attorney's name, office address, and office telephone number.

History. Acts 1997, No. 1262, § 7.

16-90-1108. Information concerning appeal or post-conviction remedies.

If the defendant appeals or pursues a post-conviction remedy, the Attorney General, as to cases handled by the Attorney General, shall promptly inform the victim of:

(1) That fact;

(2) The date, time, and place of any hearing; and

(3) The decision.

History. Acts 1997, No. 1262, § 8.

16-90-1109. Information concerning confinement.

(a) Upon request of the victim, the Department of Correction, Arkansas State Hospital, and any other facility to which the defendant is committed by the court shall:

(1) Promptly inform the victim of the estimated date of the defendant's release from confinement, if reasonably ascertainable;

(2) Inform the victim at least thirty (30) days before release of the defendant on furlough or to a work-release, halfway house, or other community program; and

(3) Promptly inform the victim of the occurrence of any of the following events concerning the defendant:

(A) An escape from a correctional or mental health facility or community program;

(B) A recapture;

(C) A decision of the Governor to commute the sentence or to pardon;

(D) A release from confinement and any conditions attached to the release; and

(E) The defendant's death.

(b)(1) At least thirty (30) days before a Parole Board hearing concerning the defendant, if requested by the victim, the board shall inform the victim of the hearing and of the victim's right to submit to the board a victim impact statement and shall promptly inform the victim of any decision of the board.

(2)(A) It is the responsibility of the victim or his or her next of kin to notify the board of any change in address or telephone number.

(B) It is the responsibility of the victim or his or her next of kin to notify the board after the date of commitment of any change in regard to the desire to be notified of any future parole hearings.

History. Acts 1997, No. 1262, § 9.

16-90-1110. General requirements for information.

(a)(1) Unless otherwise provided by this subchapter, information required to be furnished to the victim or other person authorized to receive notice may be furnished either orally or in writing.

(2) It is the responsibility of the victim or other person authorized to receive notice to furnish to the proper authorities, and keep current, the victim's mailing address and phone number.

(b) The person responsible for furnishing information shall promptly inform the victim of significant changes in the information to be furnished.

(c)(1) The person responsible for furnishing information may rely upon the most recent name, address, and telephone number furnished by the victim.

(2) The address and telephone number of the victim or the immediate family member shall be exempt from the Freedom of Information Act of 1967, § 25-19-101 et seq.

(3) It is the responsibility of the victim or his or her next of kin to notify the person responsible for providing notice under this subchapter regarding any change in the victim's name, address, or telephone number.

History. Acts 1997, No. 1262, § 10.

16-90-1111. Presentence report.

In preparing a presentence report, the person preparing the report shall make a reasonable effort to confer with the victim. If the victim is not available or declines to confer, the person preparing the report shall record that information in the report.

History. Acts 1997, No. 1262, § 11.

16-90-1112. Victim impact statement.

(a)(1) Before imposing sentence, the court shall permit the victim to present a victim impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated.

(2) The victim may present the statement in writing before the sentencing proceeding or orally under oath at the sentencing proceeding.

(b) The court shall give copies of all written victim impact statements to the prosecuting attorney and the defendant.

(c) The sentencing court shall consider the victim impact statement along with other factors, but if the victim impact statement includes new material factual information upon which the court intends to rely, the court shall adjourn the sentencing proceeding or take other appropriate action to allow the defendant adequate opportunity to respond.

History. Acts 1997, No. 1262, § 12.

16-90-1113. Consideration of victim impact statement at parole hearing.

(a)(1)(A) Before determining whether to release the defendant on parole, the Parole Board shall permit the victim to present a written victim impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding whether the defendant should be released on parole.

(B) At the victim's option, the victim may present the statement orally at the parole hearing.

(2) The board shall give the defendant a copy of all written victim impact statements.

(b) The board, in deciding whether to release a prisoner on parole, shall consider among other factors:

(1) Victim impact statements presented under subsection (a) of this section; and

(2) Victim impact statements presented to the sentencing court under § 16-90-1112.

History. Acts 1997, No. 1262, § 13.

16-90-1114. Derivative rights of member of victim's family.

(a) If a victim is a minor or is incapacitated, incompetent, or deceased, a member of the victim's family may exercise the rights of the victim under this subchapter.

(b) If more than one (1) member of the victim's family attempts to exercise those rights, the court may designate which of them may exercise those rights.

History. Acts 1997, No. 1262, § 14.

16-90-1115. Duty to provide information or notice.

None of the provisions of this subchapter or §§ 16-21-106 and 16-93-702(b) shall be deemed to relieve any person of the duty of providing information or notices required by any other law.

History. Acts 1997, No. 1262, § 15.

Subchapter 12 — Encouragement of Treatment and Rehabilitation of Drug Users

SECTION.

16-90-1201. Expungement of record.

A.C.R.C. Notes. References to "this chapter" in §§ 16-90-803 and 16-90-804 may not apply to this subchapter which was enacted subsequently.

16-90-1201. Expungement of record.

(a) The record of a felony offense for possession of a controlled substance or counterfeit substance in violation of § 5-64-401(c) shall be expunged pursuant to this section.

(b) This section shall apply if:

(1) The intake officer appointed by the court determines that the defendant has a drug addiction and recommends the defendant as a candidate for residential drug treatment;

(2) The court places the defendant on probation and includes as part of the terms and conditions of the probation that:

(A) The defendant successfully complete a drug treatment program approved by the court; and

(B) The defendant remain drug free until successful completion of probation; and

(3) The defendant successfully complete the terms and conditions of the probation.

(c) Nothing in this section shall require or compel any court of this state to order probation under this section, nor shall any defendant be availed the benefit of this section as a matter of right.

(d) This section shall be supplemental to all other laws concerning probation and expungement.

(e) As used in this section, the procedure, effect, and definition of "expungement" shall be in accordance with that established in § 16-90-901 et seq.

History. Acts 2001, No. 1778, § 1.

CHAPTER 91

APPEAL AND POST-CONVICTION

SUBCHAPTER.

1. Appeal.
2. Post-Conviction.

Cross References. No reversal of acquittal barring prosecution, RAP-Crim 9.

RESEARCH REFERENCES

ALR. Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR 4th 582.

Consequences of prosecution's failure to file timely brief in appeal by accused. 27 ALR 4th 213.

Right of defendant to bail pending appeal from conviction. 28 ALR 4th 227.

Duration of surety's liability on post-trial bail bond. 32 ALR 4th 575.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Am. Jur. 4 Am. Jur. 2d, App. & Err., § 1 et seq.

Ark. L. Rev. Arkansas' 1971 Criminal Discovery Act, 26 Ark. L. Rev. 1.

Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

C.J.S. 24 C.J.S., Crim. L., § 1660 et seq.

Subchapter 1 — Appeal

SECTION.
16-91-101. Right generally.
16-91-102. Applicability of statutes governing civil appeals.
16-91-103. Precedence.
16-91-104. Death of defendant.
16-91-105. Time and method of taking appeal — Motion for new trial, etc.
16-91-106. Record — Preliminary hearing.
16-91-107. Record — Transcript — Original exhibits.
16-91-108. Costs — Bond — Judgment.
16-91-109. [Repealed.]
16-91-110. Bail bond.
16-91-111. Appeal after confinement.
16-91-112. Appeal by state.
16-91-113. Matters to be considered — Preserving error — Action to be taken.
16-91-114. Acquittal as bar to prosecution.
16-91-115. Affirmance of death sentence.
16-91-116. Proceedings on reversal and new trial.
16-91-117. Supreme Court's decisions binding.
16-91-118. [Repealed.]

A.C.R.C. Notes. Acts 1997, No. 1135, § 2, as amended by Acts 1999, No. 1268, § 5, provided: "(a) Any person who is found guilty, pleads guilty, or pleads nolo contendere to manufacturing methamphetamine in violation of § 5-64-401 and is committed to the Department of Correction for a term of years, shall not be eligible for release on parole until a minimum of seventy percent (70%) of the sentence shall have been served, not counting good-time allowances, unless pardoned or the sentence is commuted to a shorter term of years by the Governor, as provided by law.

"(b) The provisions of this section shall expire on April 30, 2002."

Publisher's Notes. Some provisions of this subchapter may be superseded by the Arkansas Rules of Criminal Procedure, which became effective January 1, 1976.

Acts 1997, No. 925, enacted subchapter 2 and designated the existing provisions of this chapter as subchapter 1.

Effective Dates. Acts 1899, No. 23, § 2: effective on passage.

Acts 1899, No. 158, § 5: effective on passage.

Acts 1927, No. 6, § 2: effective 90 days after passage and approval. Approved Jan. 31, 1927.

Acts 1971, No. 333, § 15: Mar. 22, 1971. Emergency clause provided: "Whereas, it is deemed that criminal appeals should, so far as is feasible, be consistent with the statutes governing civil appeals and,

"Whereas, injustice sometimes results from the use and application of the present statutes applicable to the appeal of criminal cases and,

"Whereas, some confusion exists as to the manner in which criminal appeals are perfected, this Act is necessary for the protection of a public peace, health and safety, and an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

Acts 1994 (1st Ex. Sess.), No. 3, § 6: Mar. 4, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas meeting in the First Extraordinary Session of 1994 that dangerous criminals who have been convicted of first-degree murder and other Class Y felonies are eligible under current laws to be released on appeal bonds; that Act 31 of 1987 was intended to limit the number of dangerous criminals being released on appeal bonds, but, in reality, has failed to stop the practice of releasing these criminals; and that the law must, in more specific terms, be changed to further limit those criminals subject to release on bail pending their appeals. Therefore, in order to correct a situation which endangers the safety of the citizens of Arkansas, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

16-91-101. Right generally.

(a) Any person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this state has the right of appeal to the Supreme Court.

(b) An appeal may be taken jointly by codefendants or by just one (1) defendant although he or she may have been jointly charged and convicted with another defendant. One (1) appeal may be taken where a defendant has been found guilty of one (1) or more charges contained in any one (1) felony information or indictment.

History. Acts 1971, No. 333, § 1; A.S.A. 1947, § 43-2701; Acts 2005, No. 1994, § 276.

Amendments. The 2005 amendment inserted "or she" in (b); and deleted former (c), which was declared to have been implied repealed by Acts 1993, No. 535, in Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994). Former subsection (c) read: "There shall be no appeal from a plea of guilty or nolo contendere."

Cross References. Right of appeal, RAP-Crim 1.

CASE NOTES

Analysis

In general.
Purpose.
Appeal of right.
Appealable judgments.
Appeal on behalf of state.
Guilty pleas.
State remedy.

In General.

Acts 1993, No. 535, which is codified in part as § 16-97-101 et seq., provided in part that all laws in conflict with the act were repealed, thus repealing subsection (c) of this section. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Purpose.

Legislature intended that appeal in criminal cases, so far as feasible, should be consistent with civil appeals. State v. Adkisson, 251 Ark. 119, 471 S.W.2d 332 (1971).

Appeal of Right.

The sixth amendment guarantee of effective assistance of counsel extends not only to trial but also to appeal where the state allows a first appeal as a matter of right. Howard v. State, 291 Ark. 633, 727 S.W.2d 830 (1987).

Appealable Judgments.

Judgment refusing to discharge the accused on motion to dismiss on the ground of former jeopardy was appealable. Jones v. State, 230 Ark. 18, 320 S.W.2d 645 (1959) (decision under prior law).

In the absence of a final order of the trial court settling some issue against defendant, or finding him guilty of some offense, an appeal to the Arkansas Supreme Court will not lie. Weston v. State, 265 Ark. 58, 576 S.W.2d 705, cert. denied, 444 U.S. 965, 100 S. Ct. 453, 62 L. Ed. 2d 377 (1979).

ARCrP 24.3 does not provide for an appeal following a plea of nolo contendere where the appeal challenges the admissibility of evidence as distinguished from evidence illegally obtained. Pickett v. State, 301 Ark. 345, 783 S.W.2d 854 (1990).

Both subsection (c) of this section and RAP-Crim 1 provide that there shall be no appeal from a plea of guilty; however, one exception is found in ARCrP 24.3(b), which provides a procedure for a defendant to seek review of an adverse determination of a pretrial motion to suppress evidence. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Appeal on Behalf of State.

Where an interlocutory order was entered under an indictment for felony, by which the jurisdiction of the court was rendered doubtful, it was proper that an appeal should be taken to the Arkansas Supreme Court on behalf of the state. State v. Flynn, 31 Ark. 35 (1876); State v.

Robinson, 55 Ark. 439, 18 S.W. 541 (1892) (preceding decisions under prior law).

Guilty Pleas.

Some exceptions to the rule in subsection (c), that there is no right to appeal from a guilty plea, include the following: (1) ARCrP 24.3(b) permits an appeal from a conditional plea of guilty following the denial of a motion to suppress; (2) an appeal on the issue of the application of jail-time credit appears to be permissible; (3) the denial of a post-judgment motion, filed after a guilty plea to correct an illegal sentence, is appealable; and (4) a defendant may also appeal after a guilty plea when a jury sets punishment under the bifurcated procedure established by § 16-97-101(6). Hampton v. State, 48 Ark. App. 93, 890 S.W.2d 279 (1995).

When the appeal by a defendant who pled guilty is from a decision which was neither a part of the guilty plea acceptance nor the sentencing procedure which was an integral part of the guilty plea acceptance, the appeal is allowed. Hodge v. State, 320 Ark. 31, 894 S.W.2d 927 (1995).

State Remedy.

In the trial of a civil rights complaint by a state prisoner against a state prison warden, federal district court correctly refused to hear the prisoner's state claim since that claim would have to be made by direct appeal of the conviction in the Arkansas courts. Manning v. Lockhart, 623 F.2d 536 (8th Cir. 1980).

Cited: Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977); Butler v. State, 264 Ark. 243, 570 S.W.2d 272 (1978); Bass v. State, 9 Ark. App. 211, 657 S.W.2d 218 (1983); Henagan v. State, 302 Ark. 599, 791 S.W.2d 371 (1990); State v. Sherman, 303 Ark. 284, 796 S.W.2d 339 (1990).

16-91-102. Applicability of statutes governing civil appeals.

Matters pertaining to several appeals, the docketing, designation, abbreviation, stipulation, preparation, and correction or modification of the record on appeal, as well as appeals where no stenographic record was made, shall be governed by those statutes which apply to civil cases on appeal to the Supreme Court of Arkansas.

History. Acts 1971, No. 333, § 10; A.S.A. 1947, § 43-2705.

Cross References. Civil appeals, ARCrP 37.

16-91-103. Precedence.

Appeals in criminal cases shall take precedence over all other business of the Supreme Court and shall be placed first upon the docket for trial.

History. Crim. Code, § 349; C. & M. Dig., § 3431; Pope's Dig., § 4274; A.S.A. 1947, § 43-2702.

Cross References. Precedence, ARCrP 27.1.

RESEARCH REFERENCES

Ark. L. Rev. Speedy Trial: A Comparative Analysis Between the American Bar Association's Standards of Criminal Justice and Arkansas Law, 25 Ark. L. Rev. 234.

CASE NOTES

Analysis

Jurisdiction.
Running of time.

Jurisdiction.

Granting of an appeal in criminal cases in accordance with the statutory procedure was a prerequisite to the court's consideration of the case. Byrd v. State, 250 Ark. 223, 464 S.W.2d 565 (1971).

Where defendant's appeal had not been docketed in the Arkansas Supreme Court, the trial court had jurisdiction to hear his motion for new trial even though notice of appeal had been filed. State v. Adkisson, 251 Ark. 119, 471 S.W.2d 332 (1971).

Running of Time.

The sixty-day period during which an appeal could be taken began at the time of judgment, not at the time motion for new trial was denied. Higginbotham v. State, 251 Ark. 832, 475 S.W.2d 522 (1972).

Cited: Holman v. State, 257 Ark. 239, 515 S.W.2d 638 (1974).

16-91-104. Death of defendant.

No appeals shall be taken after the defendant's death, and, upon his or her death, an appeal taken during his or her life shall abate and shall not be revived.

History. Crim. Code, § 333; C. & M. Dig., § 3392; Pope's Dig., § 4235; A.S.A. 1947, § 43-2707.

Cross References. Death of defendant, RAP-Crim 1.

16-91-105. Time and method of taking appeal — Motion for new trial, etc.

(a)(1) Within thirty (30) days from the date of the sentence and entry of judgment by the trial judge, the person desiring to appeal the judgment shall file with the trial court a notice of appeal identifying the parties taking the appeal and the judgment appealed.

(2) The notice of appeal shall include a certificate by the appealing party or his or her attorney that a transcript of the trial record has been ordered from the court reporter if, for the purposes of the appeal, a transcript is determined essential to resolve the issues on appeal.

(3) Notification of the filing of the notice of appeal shall be given to all other parties or their representatives involved in the cause by mailing a copy of the notice of appeal to the parties or their representatives, but failure to give the notification shall not affect the validity of the appeal.

(4) Failure of the appellant to take any further steps to secure the review of the appealed conviction shall not affect the validity of the appeal but shall be grounds only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(5) If an appeal has not been docketed in the Supreme Court, the parties, with the approval of the trial court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon a motion and notice by the appellant.

(b)(1) Prior to the time fixed to file a notice of appeal, a person convicted of either a felony or misdemeanor may file a motion for new trial, a motion in arrest of judgment, or any other application for relief.

(2) The pleadings should include a statement that the movant believes the action is meritorious and is not offered for the purpose of delay.

(3) Service of the motion shall be given to the representative of the prosecuting party.

(4) If requested or found to be necessary, the trial court shall promptly designate a date certain to take evidence and to hear and dispose of all matters that are presented.

(5) Upon the filing of any motion or other application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications.

History. Acts 1971, No. 333, §§ 3, 9; A.S.A. 1947, §§ 43-2703, 43-2704.

Cross References. Post-trial motions, ARCrP 33.3.

Time and method of appeal, RAP-Crim 2.

CASE NOTES

Analysis

Applicability.
Amendment of record.
Motion for new trial, etc.
Timeliness.

Applicability.

In a motion for new trial alleging jury misconduct and lack of a fair trial, ARCrP 36.22 (now see ARCrP 33.3) and this section have set the time frame, 30 days from date of judgment, and have effectively superseded § 16-89-130. Cigainero v. State, 310 Ark. 504, 838 S.W.2d 361 (1992).

Amendment of Record.

Record of circuit court could be amended so as to make it speak the truth after appeal or writ of error. Freed v. State, 21 Ark. 212 (1860); Binns v. State, 35 Ark. 118 (1879); Sweeney v. State, 35 Ark. 585 (1880) (preceding decisions under prior law).

Motion for New Trial, Etc.

Trial court did not abuse discretion by denying defendant's motion for continuance. Mitchell v. State, 258 Ark. 562, 528 S.W.2d 368 (1975).

Trial court did not abuse its discretion in denying the defendant a new trial where no written motion for new trial on the basis alleged was served upon the prosecuting attorney. Newberry v. State, 262 Ark. 334, 557 S.W.2d 864 (1977).

Where the defendant claimed that he had never received the notice of trial mailed to him, he should have made a motion for relief to the trial court pursuant to this section, and failure to pursue his available remedy in that court meant that he was not entitled to relief on appeal. Bridger v. State, 264 Ark. 789, 575 S.W.2d 154, cert. denied, 444 U.S. 916, 100 S. Ct. 231, 62 L. Ed. 2d 171 (1979).

Motion for new trial held untimely. Chisum v. State, 274 Ark. 332, 625 S.W.2d 448 (1981); Smith v. State, 301 Ark. 374, 784 S.W.2d 595 (1990); Cigainero v. State, 310 Ark. 504, 838 S.W.2d 361 (1992).

Timeliness.

Good reason shown for tardiness in filing the notice of appeal. Goodwin v. State, 261 Ark. 926, 552 S.W.2d 233 (1977).

The jurisdictional consequences of failing to timely file a motion for a new trial should mirror those which result from failing to timely file a notice of appeal since the limitations period of subdivision (b)(1) of this section and former ARCrP 36.22 (now see ARCrP 33.3) is specifically defined by reference to that set forth in former ARCrP 36.9(a) (now see RAP-Crim 2); accordingly, compliance with the thirty-day filing period contemplated by subdivision (b)(1) and former ARCrP 36.22 is not a jurisdictional prerequisite to the state court's consideration of a motion for a new trial based upon newly discovered evidence. Perry v. Norris, 879 F. Supp. 1503 (E.D. Ark. 1995), aff'd, 107 F.3d 665 (8th Cir. 1997).

Cited: Finch v. State, 262 Ark. 313, 556 S.W.2d 434 (1977); Selph v. State, 264 Ark. 197, 570 S.W.2d 256 (1978); Kozal v. State, 264 Ark. 587, 573 S.W.2d 323 (1978).

16-91-106. Record — Preliminary hearing.

(a) Prior to the time the complete record on appeal is settled and certified as provided by law, any appealing party may docket the appeal in order to make in the Supreme Court of Arkansas a motion for dismissal, a stay pending appeal, an application for or reduction of bail bond, an order to proceed in forma pauperis, or for any intermediate order.

(b) The clerk of the trial court, at the request of the appealing party, shall certify and transmit to the appellate court a copy of such portion of the record of proceedings as may be available or needed for that purpose.

History. Acts 1971, No. 333, § 7; A.S.A. 1947, § 43-2711.

Cross References. Record for preliminary hearing in Supreme Court, RAP-Crim 4.

16-91-107. Record — Transcript — Original exhibits.

(a) It shall not be necessary to file with either the notice of appeal or the designation of contents of record any portion of the reporter's transcript of the evidence of proceedings.

(b) All exhibits in the trial of any criminal case shall be a part of the record on appeal unless specifically omitted by the appealing party.

History. Acts 1971, No. 333, §§ 5, 6; A.S.A. 1947, §§ 43-2709, 43-2710.

Cross References. Time for filing record, contents of record, RAP-Crim 4.

16-91-108. Costs — Bond — Judgment.

(a) There shall be no bond for costs as a requisite for the appeal of either a felony or misdemeanor conviction.

(b) On the affirmance of a judgment, where the appeal is taken by the defendant, and on the reversal of a judgment, where the appeal is taken by the state, a judgment for costs shall be rendered against the defendant.

History. Crim. Code, § 353; C. & M. Dig., § 3434; Pope's Dig., § 4277; Acts 1971, No. 333, § 4; A.S.A. 1947, §§ 43-2708, 43-2739.

Cross References. Bond, RAP-Crim 5. Judgment for costs, RAP-Crim 13.

CASE NOTES

Cited: Jordan v. State, 102 Ark. 43, 143 S.W. 131 (1912).

16-91-109. [Repealed.]

Publisher's Notes. This section, concerning bail generally, was repealed by Acts 1987, No. 31, § 2. The section was derived from Acts 1899, No. 23, § 1, p. 24; C. & M. Dig., §§ 2958, 3395; Pope's Dig., §§ 3774, 4238; A.S.A. 1947, § 43-2714.

16-91-110. Bail bond.

(a) The bail bond provided for in this section shall be filed in the office of the clerk of the court in which the conviction is had, and a copy thereof shall be attached to the bill of exceptions and shall be made a part of the transcript to be filed in the Supreme Court.

(b)(1) Except those offenses provided for in subdivisions (b)(2) and (3) of this section, when a criminal defendant has been found guilty of or pleaded guilty or nolo contendere to a criminal offense and is sentenced to serve a term of imprisonment, and the criminal defendant has filed an appeal, the court shall not release the defendant on bail or otherwise pending appeal unless the court finds:

(A) By clear and convincing evidence that the person is not likely to flee or that there is not a substantial risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

(B) That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact.

(2) When a criminal defendant has been found guilty of or pleaded guilty or nolo contendere to a criminal offense of capital murder, § 5-10-101, the court shall not release the defendant on bail or otherwise pending appeal or for any reason.

(3) When a criminal defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to a criminal offense of murder in the first degree, § 5-10-102, rape, § 5-14-103, aggravated robbery, § 5-12-103, or causing a catastrophe, § 5-38-202(a), or the criminal offense of kidnapping, § 5-11-102, or arson, § 5-38-301, when classified as Class Y felonies, or manufacturing methamphetamine in violation of § 5-64-401, and is sentenced to death or a term of imprisonment, the court shall not release the defendant on bail or otherwise pending appeal or for any reason.

(c)(1) If the appeal is granted by the circuit court, the appeal bond shall be conditioned that the defendant surrender himself or herself in the Supreme Court upon the dismissal of the appeal or upon the rendition of final judgment upon the appeal.

(2)(A) If the defendant fails to surrender himself or herself in the Supreme Court in compliance with the conditions of his or her bond, the Supreme Court shall direct that fact to be entered on its records and shall adjudge the bail bond of the defendant, or the money deposited in lieu thereof, to be forfeited.

(B) The Clerk of the Supreme Court shall immediately make and forward to the clerk of the circuit court of the county in which the

defendant was tried a certified copy of the judgment of the Supreme Court.

(3) The circuit clerk shall file the copy and shall immediately issue a summons against the sureties on the bail bond requiring them to appear and show cause why judgment should not be rendered against them for the sum specified in the bail bond on account of the forfeiture thereof, which summons shall be made returnable and shall be executed as in civil actions, and the action shall be docketed and shall proceed as an ordinary civil action.

(4) The summons may be served in any county in the state, and the service of the summons on the defendant or defendants in any county in the state shall give the court complete jurisdiction of the defendant and the cause.

(5) No pleadings on the part of the state shall be required in such cases.

(d)(1) If the court in which the case is tried refuses to grant an appeal and the appeal shall thereafter be granted by any Justice or Justices of the Supreme Court, the bond shall be conditioned that, upon the dismissal of the appeal or the rendition of the final judgment therein by the Supreme Court, the defendant shall surrender himself or herself in execution of the judgment.

(2) If the appeal is not granted by the court in which the defendant was convicted, the bail bond shall also be conditioned that, if the appeal is not granted by any Justice or Justices of the Supreme Court, the defendant shall, immediately upon the denial of an appeal, surrender himself or herself to the sheriff of the county in which he or she was convicted in execution of the judgment and sentence of the trial court.

History. Acts 1899, No. 158, §§ 3, 4, p. 291; C. & M. Dig., §§ 2959, 2960, 3398-3402; Acts 1927, No. 6, § 1; Pope's Dig., §§ 3775, 3776, 4241 — 4245; A.S.A. 1947, §§ 43-2715 — 43-2719; Acts 1987, No. 31, § 1; 1994 (1st Ex. Sess.), No. 3, § 1; 1997, No. 1135, § 1.

Publisher's Notes. Acts 1994 (1st Ex. Sess.), No. 3, § 2, provided: "This act may be known and cited as the 'Officer Henry Callenan Memorial Post-Conviction Appeal Bond Elimination Act'."

The procedural provisions of this section were declared superseded by ARCrP 36.5 through ARCrP 36.8 in Casement v. State, 318 Ark. 225, 884 S.W.2d 593 (1994).

Cross References. Bail on appeal, RAP-Crim 6.

CASE NOTES

Analysis

Construction.
Appellate review.
Denial of bail.
Discretion of court.
Effect of amendments.
Factors considered.
Supersession of section.

Construction.

The language of subdivision (b)(3) of this section clearly indicates that it is the responsibility of the sentencing court in a first degree murder or Class Y felony case to refuse release on bail or pending appeal; nothing is said concerning a situation where a party is already under an appeal bond for first degree murder and is subsequently brought into another court on an unrelated charge. Foreman v. State, 317 Ark. 146, 875 S.W.2d 853 (1994).

Appellate Review.

The remedy of the writ of certiorari is appropriate to review bail bond proceedings. Casement v. State, 318 Ark. 225, 884 S.W.2d 593 (1994).

Because the appellate court affirmed the trial court's judgment convicting defendant of possession of drug paraphernalia with intent to manufacture and possession of a controlled substance, defendant's issue of bail pending appeal became moot and the appellate court did not have to decide moot issues; the appropriate and meaningful action that defendant could have taken would have been to petition the appellate court for a writ of certiorari separately challenging the trial court's denial of an appeal bond. Walley v. State, 353 Ark. 586, 112 S.W.3d 349 (2003).

Denial of Bail.

Trial court's order denying bail pending appeal was upheld by appellate court where trial court concluded that appeal was intended only for purposes of delay and did not raise a substantial question of law or fact. Vineyard v. State, 29 Ark. App. 180, 782 S.W.2d 370 (1989).

There was no non-frivolous argument to be made regarding the denial of defendant's appeal bond where nothing in the Arkansas Constitution or United States Constitution guaranteed a person convicted of a crime the right to bail pending appeal; the direct appeal of a verdict was not the appropriate vehicle through which a defendant may challenge a denial of appeal bond where writs of certiorari had been labeled the appropriate vehicle for relief in bail proceedings. Hatton v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 23 (Jan. 12, 2005).

Discretion of Court.

Where the circuit court set bond for defendant in the amount of $1,000,000, "cash only," explicitly for the purpose of putting it out of reach, and where the court failed to consider the factors set forth in ARCrP 9.2(c), it exceeded the bounds of its discretion in arbitrarily setting bail at such a level. Foreman v. State, 317 Ark. 146, 875 S.W.2d 853 (1994).

Effect of Amendments.

Acts 1994 (1st Ex. Sess.), No. 3, § 1, amended this section by adding certain Class Y felonies to those offenses for which appeal bond is prohibited; otherwise, this section, which has been in place since 1987, was unchanged by the 1994 legislation. Casement v. State, 318 Ark. 225, 884 S.W.2d 593 (1994).

Factors Considered.

Both this section and former ARCrP 36.5 (now see RAP-Crim 6) require trial court to consider whether criminal defendant (1) will appear at the conclusion of appellate proceedings, and (2) the likelihood of conviction, before granting bond on appeal. Vineyard v. State, 29 Ark. App. 180, 782 S.W.2d 370 (1989).

Supersession of Section.

The post-conviction appeal bond provisions of this section are "procedural" and within the scope of former ARCrP 36.5 through 36.8 (now see RAP-Crim 6). Casement v. State, 318 Ark. 225, 884 S.W.2d 593 (1994).

The purpose of former ARCrP 36.5 (now see RAP-Crim 6) is to establish criteria requiring release pending appeal or fixing of bail only after a finding that disqualifying factors are not present; to the extent that ARCrP 36.5 conflicts with this section, the rule controls. Casement v. State, 318 Ark. 225, 884 S.W.2d 593 (1994).

16-91-111. Appeal after confinement.

(a) If a judgment of confinement in the Department of Correction has been executed before the certificate of appeal was delivered to the sheriff whose duty it was to execute the judgment, the defendant shall remain in the Department of Correction during the pendency of the appeal unless discharged by the expiration of his or her term of confinement or by pardon.

(b) Upon a reversal, if a new trial is ordered, the defendant shall be removed from the Department of Correction to the county jail from which he or she was brought by the sheriff of the county.

History. Crim. Code, § 334; C. & M. Dig., § 3418; Pope's Dig., § 4261; A.S.A. 1947, § 43-2726; Acts 2005, No. 1994, § 284.

Amendments. The 2005 amendment substituted "Department of Correction" for "penitentiary" twice in (a) and once in (b).

Cross References. Appeal after confinement, RAP-Crim 7.

CASE NOTES

Commitment Before Supersedeas.

Petitioner who has been lodged in the penitentiary after the issuance of the supersedeas but before the supersedeas was served on the officer charged with the execution of the sentence is not entitled to be sent back to the county jail. Ex parte Lawrence, 71 Ark. 54, 70 S.W. 470 (1902); Dowell v. State, 191 Ark. 311, 86 S.W.2d 23 (1935).

Cited: Kimble v. State, 246 Ark. 407, 438 S.W.2d 705 (1969).

16-91-112. Appeal by state.

(a) Where an appeal on behalf of the state is desired, the prosecuting attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of the record and transmit it to the Attorney General or deliver the transcript to the prosecuting attorney, to be transmitted by him or her.

(b) If the Attorney General, on inspecting the record, is satisfied that error has been committed to the prejudice of the state, and upon which it is important to the correct and uniform administration of the criminal laws that the Supreme Court should decide, he or she may, by lodging the transcript in the clerk's office of the Supreme Court within sixty (60) days after the decision, take the appeal.

(c) An appeal by the state from a decision of the circuit court shall not suspend the proceedings in the case.

History. Crim. Code, §§ 329, 337; C. & M. Dig., §§ 3410, 3416; Pope's Dig., §§ 4253, 4254, 4259; A.S.A. 1947, §§ 43-2720, 43-2721.

Publisher's Notes. Acts 1971, No. 333, § 13, provided that the act would not alter the manner in which the state or other prosecuting party could appeal in a criminal case.

Cross References. Appeal by state, RAP-Crim 3.

CASE NOTES

Analysis

Purpose.
Appealable decisions.
Noncompliance.
Scope of review.
Timeliness.
Transcript.

Purpose.

By this section a method is afforded the law officers of the state to take the opinion of the Arkansas Supreme Court upon questions which they consider important to the correct and uniform administration of the criminal law. State v. Dulaney, 87 Ark. 17, 112 S.W. 158 (1908); State v. Taylor, 180 Ark. 588, 22 S.W.2d 34 (1929).

Appealable Decisions.

If the decision of the question presented will not serve to secure correct and uniform administration of the criminal law, the appeal will not be entertained. State v. Smith, 94 Ark. 368, 126 S.W. 1057 (1910).

This section does not contemplate an appeal in a case in which the only error alleged is that the court incorrectly decided that the evidence was not sufficient to warrant a submission of the issue to the

jury. State v. Spears, 123 Ark. 449, 185 S.W. 788 (1916).

This section does not require appellate opinion upon correctness of trial court's conclusion where error complained of related to a question of fact or a mixed question of law and fact. State v. Massey, 194 Ark. 439, 107 S.W.2d 527 (1937).

Noncompliance.

Where it does not appear that the provisions of this section have been complied with, the case will be stricken from the docket of the Arkansas Supreme Court. State v. Cox, 29 Ark. 115 (1874).

The duty of charging an accused with a felony is reserved either to the grand jury or the prosecutor, and the trial judge encroached upon the prosecutor's constitutional duties and breached the separation of powers doctrine where he amended charge from a felony to a misdemeanor over the state's objection. State v. Brooks, 301 Ark. 257, 783 S.W.2d 368 (1990).

Scope of Review.

Where there is no motion for a new trial, only errors appearing on the face of the record will be considered on appeal by the state. State v. Wilhite, 211 Ark. 1065, 204 S.W.2d 562 (1947).

Timeliness.

Appeal held untimely. State v. Alexander, 259 Ark. 139, 531 S.W.2d 707 (1976).

Transcript.

There is no language in this section requiring attorney general to endorse on transcript of record a direction to the clerk of supreme court. State v. Knight, 259 Ark. 107, 533 S.W.2d 488 (1976).

Cited: State v. Jacks, 243 Ark. 77, 418 S.W.2d 622 (1967); Doty v. Goodwin, 246 Ark. 149, 437 S.W.2d 233 (1969); State v. Reeves, 246 Ark. 1187, 442 S.W.2d 229 (1969); Cherry v. Hall, 251 Ark. 305, 472 S.W.2d 225 (1971); State v. Lamb, 251 Ark. 999, 476 S.W.2d 7 (1972); State v. Cosentino, 252 Ark. 68, 477 S.W.2d 460 (1972); State v. Stringfellow, 253 Ark. 390, 486 S.W.2d 65 (1972); State v. Gibbons, 255 Ark. 352, 500 S.W.2d 341 (1973); State v. Knight, 259 Ark. 107, 533 S.W.2d 488 (1976); Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981); State v. Russell, 271 Ark. 817, 611 S.W.2d 518 (1981); State v. Lee, 277 Ark. 142, 639 S.W.2d 745 (1982); Boone v. State, 282 Ark. 274, 668 S.W.2d 17 (1984).

16-91-113. Matters to be considered — Preserving error — Action to be taken.

(a) The Supreme Court need only review those matters briefed and argued by the appellant, except that where either a sentence for life imprisonment or death has been imposed the Supreme Court shall review all errors prejudicial to the rights of the appellant.

(b)(1) It shall not be necessary to file a motion for new trial to obtain review of any matter urged for review on appeal.

(2) If a motion for new trial is submitted to the trial court, on appeal, the appellant shall not be restricted to a consideration of matters assigned therein.

(3) Formal exceptions to rulings or orders of the trial court are unnecessary; but for all purposes for which an exception has previously been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he or she desires the court to take or his or her objections to the action of the court and his or her grounds therefor. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him or her.

(c)(1) A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution or the laws of Arkansas, or for any reason determines that the appellant did not have a fair trial.

(2) Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged.

(3) In all other cases, the conviction must be affirmed, but the sentence of the appellant may be reduced if it is deemed excessive.

History. Acts 1971, No. 333, §§ 8, 11, 12; A.S.A. 1947, §§ 43-2725 — 43-2725.2.

Cross References. Actions to be taken on appeal, RAP-Crim 15.

Exceptions and motions for new trial unnecessary, RAP-Crim 8.

Exceptions to decision of court, § 16-89-124.

Matters to be considered on appeal, RAP-Crim 14.

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure-Specificity of Objection. 28 Ark. L. Rev. 406.

UALR L.J. Survey — Criminal Procedure, 12 UALR L.J. 193.

CASE NOTES

Analysis

Applicability.
Capital murder.
Duty of parties.
Instructions.
Jurisdiction of trial court.
Objections.
Preserving error.
Reduction of sentence.
Reversible error.
Sentence of life imprisonment or death.
Standard of review.

Applicability.

Subsection (b) applies to the state the same as to individuals and it does not conflict with or change the manner by which the state may appeal as set forth in § 16-91-112. State v. Knight, 259 Ark. 107, 533 S.W.2d 488 (1976).

Capital Murder.

Supreme Court of Arkansas upheld defendant's conviction for the capital murder of an 87-year-old woman who was found shot to death in her yard where defendant confessed to the crime and the record of the guilt phase was reviewed for any prejudicial error under Ark. Sup. Ct. R. 4-3(h), Ark. R. App. P. — Crim. 10, and subsection (a) of this section, and none was found. Anderson v. State, 357 Ark. 180, 163 S.W.3d 333 (2004).

On direct appeal of a capital murder case, where the Arkansas Supreme Court had considered all adverse rulings objected to by defendant but not argued on appeal and found no error, the effectiveness of counsel in making a motion for suppression had implicitly been approved and could not be challenged in a later proceeding. State v. Fudge, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 226 (Apr. 14, 2005).

Duty of Parties.

Even in capital cases, the Arkansas Supreme Court requires a defendant to have taken some action at trial to protect himself against perceived prejudice and to point out those actions in the appeal; the State Attorney General, as appellee, has the duty of double-checking a defendant's work to make sure all rulings adverse to the defendant are abstracted and briefed. Gardner v. Norris, 949 F. Supp. 1359 (E.D. Ark. 1996).

Instructions.

The Arkansas rule that has been followed in misdemeanor and civil cases of requiring the instructions to be briefed when error is assigned for the giving or refusing of an instruction should now be followed in felony criminal cases. Ellis v. State, 267 Ark. 690, 590 S.W.2d 309 (Ct. App. 1979).

The court does not consider an assigned error concerning instructions absent an abstract of the instructions given and will assume the jury was properly instructed. Ellis v. State, 267 Ark. 690, 590 S.W.2d 309 (Ct. App. 1979).

Jurisdiction of Trial Court.

After defendant's valid sentence had

been put into execution and an appeal was taken to the Supreme Court, the trial court was without jurisdiction to modify, amend or revise it, either during or after the term at which it was pronounced. Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979).

Objections.

The Arkansas Supreme Court has repeatedly refused to interpret former ARCrP 36.24 (see now RAP-Crim 14) as absolving a party from making the appropriate contemporaneous objection at trial as a prerequisite to appellate review; indeed, the Court has flatly held that the Arkansas procedure requiring review of the record for error in life and death cases presupposes that an objection was made at trial. Ruiz v. Norris, 868 F. Supp. 1471 (E.D. Ark. 1994), aff'd, 71 F.3d 1404 (8th Cir. 1995), cert. denied, 519 U.S. 963, 117 S. Ct. 384, 136 L. Ed. 2d 301 (1996).

The Arkansas Supreme Court has noted repeatedly that its obligation to review the entire record in a capital case presupposes that an objection was made at trial; there is no requirement that the Arkansas court ever consider errors not raised by the appellant since it is the appellant's obligation to point out those errors at trial and on appeal. Gardner v. Norris, 949 F. Supp. 1359 (E.D. Ark. 1996).

While it is true that S. Ct. & Ct. App. Rule 4-3(h) requires the Arkansas Supreme Court to review the record for error in life and death cases, this review presupposes that an objection was made at trial; where defendant failed to make a specific motion under ARCrP 33.1 for directed verdict indicating the particular deficiencies in the state's proof, it is as if he failed to object at all, and that failure below precludes review of the sufficiency of the evidence on appeal. Webb v. State, 327 Ark. 51, 938 S.W.2d 806 (1997).

Preserving Error.

While formal exceptions need not be saved, objections must have been made to the proceedings in order to obtain review in the Arkansas Supreme Court. Alexander v. State, 103 Ark. 505, 147 S.W. 477 (1912); Morris v. State, 142 Ark. 297, 219 S.W. 10 (1920); Sullivan v. State, 161 Ark. 19, 257 S.W. 58 (1923); Howell v. State, 180 Ark. 241, 22 S.W.2d 47 (1929); Lewis v. State, 202 Ark. 6, 148 S.W.2d 668 (1941) (preceding decisions under prior law).

If a defendant fails to object to the competency of a witness at the trial, he cannot raise the question for the first time on appeal. Williams v. State, 257 Ark. 8, 513 S.W.2d 793 (1974).

An appellant, in order to preserve a question for review on appeal, had to do nothing more than make known to the trial court what he sought in the way of a ruling. Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980), cert. denied, 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

Defense counsel was not required to ask that the witness' testimony be stricken since, under § 16-89-115, that remedy was available only when the state elected not to comply with an order of the court to deliver a statement to the defendant; nor was any further objection by defense counsel necessary. Blakemore v. State, 268 Ark. 145, 594 S.W.2d 231 (1980).

An appellant is barred from arguing a point not supported by an objection in the trial court, and the Arkansas Supreme Court overlooks a failure to object in the trial court only when the error is so great that the trial judge was under a duty to correct his own action immediately and when no objection or admonition could have undone the damage or erased the effect of his error from the minds of the jurors. Smith v. State, 268 Ark. 282, 595 S.W.2d 671 (1980).

When life is at stake, the Arkansas Supreme Court will make its own examination of the record and reject or accept, on their merits, all objections made at trial, whether or not argued on appeal, but it will not consider a matter in the absence of an objection. Fretwell v. State, 289 Ark. 91, 708 S.W.2d 630 (1986).

Appellate court will not consider an argument on appeal unless it is made below. White v. State, 298 Ark. 163, 765 S.W.2d 949 (1989); McDonald v. State, 37 Ark. App. 61, 824 S.W.2d 396 (1992).

Where the prosecuting attorney's comments during closing argument, indeed the expressions complained of, were so interlaced and interwoven that they constituted one theme that extended throughout the entire argument, defense counsel's motion for mistrial encompassed and preserved on appeal all the expressions at issue, not just the remarks prompting or preceding the objection. Mil-

ler v. Lockhart, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

Defendant's point of error that the trial court should have excused a juror for cause was not preserved for appellate review because defense counsel essentially agreed with the trial court's ruling and conceded that there were no grounds to excuse the juror for cause; thus, there was no reversible error reviewable under Ark. Sup. Ct. & Ct. App. R. 4-3(h) or subsection (a) of this section. Roberts v. State, 352 Ark. 489, 102 S.W.3d 482 (2003).

Reduction of Sentence.

Where the court concluded that the evidence was sufficient to sustain the judgment, it was without authority to reduce defendant's sentence. Hurst v. State, 251 Ark. 40, 470 S.W.2d 815 (1971).

The Arkansas Supreme Court could not, under Ark. Const., Art. 4, § 2 and Ark. Const., Art. 6, § 18, reduce the sentence under § 5-64-401 (a)(1)(ii) as "excessive" where it was within statutory limits and showed no error in its passing. Abbott v. State, 256 Ark. 558, 508 S.W.2d 733 (1974).

The state Supreme Court has no authority to reduce a sentence that is not in excess of statutory limits. Hooper v. State, 257 Ark. 103, 514 S.W.2d 394 (1974).

Where three-year sentence originally proposed by judge was arrived at without consideration of defendant's indigency or the time he had spent in jail awaiting trial, the sentence was reduced to three years with credit for six months' pretrial incarceration. Walters v. State, 259 Ark. 447, 533 S.W.2d 517 (1976).

Where sentence was erroneously enhanced on basis of prior conviction, such error did not mandate a new trial since the Arkansas Supreme Court could reduce the sentence in lieu of reversing and remanding for a new trial. Ellis v. State, 270 Ark. 243, 603 S.W.2d 891 (1980).

Where the defendant was improperly sentenced and both parties agreed on what the sentence should have been, the appellate court correctly reduced the defendant's sentence to the minimum. Mincy v. State, 19 Ark. App. 80, 717 S.W.2d 213 (1986).

Court reduced the sentence for possession with intent to deliver cocaine from a term of sixty years to fifty years, the maximum term of years under § 5-4-501(a)(7) in accordance with subsection (c)(3). Nichols v. State, 306 Ark. 417, 815 S.W.2d 382 (1991).

Reversible Error.

Evidence held insufficient to require reversal. Hobbs v. State, 86 Ark. 360, 111 S.W. 264 (1908) (decision under prior law); Brown v. State, 262 Ark. 298, 556 S.W.2d 418 (1977).

Evidence held sufficient to require reversal. Garner v. State, 97 Ark. 63, 132 S.W. 1010 (1910) (decision under prior law).

The fact that the court ended its opinion with word "reversed" and was silent as to whether case was remanded or dismissed was of no consequence as the court's intent was evident from the opinion. Upton v. State, 255 Ark. 1071, 502 S.W.2d 454 (1973).

As to excessive sentences, see: Tenpenny v. State, 256 Ark. 523, 508 S.W.2d 752 (1974); Hooper v. State, 257 Ark. 103, 514 S.W.2d 394 (1974).

Sentence of Life Imprisonment or Death.

In first degree murder prosecution, failure to instruct the jury that it may fix the punishment at life imprisonment was considered by appellate court even though not assigned as error in the motion for new trial. Smith v. State, 205 Ark. 1075, 172 S.W.2d 248 (1943) (decision under prior law).

On appeals in capital cases the court will not only consider each assignment of error, but it will also have examined the transcript for each objection made in the trial court by the defendant. Rorie v. State, 215 Ark. 282, 220 S.W.2d 421 (1949) (decision under prior law).

In a capital case, the court reviewed every objection in the record. Moore v. State, 229 Ark. 335, 315 S.W.2d 907 (1958), cert. denied, 358 U.S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353 (1959) (decision under prior law).

Where appellant had been sentenced to life imprisonment, the court was required to consider objections that the appellant had raised during the trial but did not argue on appeal in addition to each assignment of error. Smith v. State, 259 Ark. 703, 536 S.W.2d 289 (1976).

In a case where the sentence is life

imprisonment without parole, the Arkansas Supreme Court must examine the record for prejudicial errors. Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S. Ct. 144, 66 L. Ed. 2d 64 (1980); 459 U.S. 1020, 103 S. Ct. 386, 74 L. Ed. 2d 517 (1982).

The Arkansas Supreme Court is required by this section to review all errors prejudicial to the rights of the defendant in a case where a death sentence is imposed; this obligation is implemented through court procedure as outlined in RAP-Crim 14 and Sup. Ct. & Ct. App. R. 4-3(h). Gardner v. Norris, 949 F. Supp. 1359 (E.D. Ark. 1996).

The Arkansas Supreme Court has an affirmative duty to review the record in all death-penalty cases for prejudicial error. State v. Robbins, 339 Ark. 379, 5 S.W.3d 51 (1999).

When a defendant has received a sentence of life imprisonment, it will continue to be his responsibility to bring forward an appeal; however, when the death penalty has been imposed, the Arkansas Supreme Court is required to perform an automatic review of the record for egregious errors such as those that fall within the exception to the plain-error rule. State v. Robbins, 339 Ark. 379, 5 S.W.3d 51 (1999).

Appellate court needed the complete record designated by a defendant who was appealing his conviction and life sentence for capital murder in order to fulfill its duty under this section and Ark. Sup. Ct. & Ct. App. R. 4-3(h) to conduct an independent review of the record for prejudicial error; thus, the trial court personnel were ordered to provide the missing parts of the record within 30 days. Howell v. State, 350 Ark. 47, 84 S.W.3d 442 (2002).

Where defendant was sentenced to life in prison and the record on appeal did not contain a complete transcript of jury selection and voir dire or opening and closing statements, the reviewing court was unable to review all errors prejudicial to defendant as required under Ark. Sup. Ct. & Ct. App. R. 4-3(h). Romes v. State, — Ark. —, 139 S.W.3d 519, 2003 Ark. LEXIS 688 (2003).

Standard of Review.

In reviewing the denial of a motion to suppress, the appellate court makes an independent examination based upon the totality of the circumstances and reverses only if the decision of the trial court was clearly against the preponderance of the evidence. Hayes v. State, 312 Ark. 349, 849 S.W.2d 501 (1993).

The applicable statutory provisions as well as prior decisions of the Arkansas Supreme Court are crystal clear that the application of the reasonable doubt standard is required in appellate review of aggravating circumstances findings. Miller v. Lockhart, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd, 65 F.3d 676 (8th Cir. 1995).

An automatic review of the entire record in all death-penalty cases is useful when evaluating whether a defendant's waiver of his right to appeal was proper under Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988); such a review would also enable the court to determine (1) whether any errors raised in the trial court are prejudicial to the defendant, in accordance with this section and Ark. Sup. Ct. R. 4-3(h), (2) whether any plain errors covered by the exceptions outlined in Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred, and (3) whether other fundamental safeguards were followed. State v. Smith, 340 Ark. 257, 12 S.W.3d 629 (2000).

It was the intent of the Arkansas Supreme Court that the counsel appointed pursuant to the court's decision in State v. Robbins, 339 Ark. 379, 5 S.W.3d 51 (1999), would not serve as a representative of a party but rather would assist the court in its review because, when that counsel represents one of the parties, a conflict of interest exists. State v. Robbins, 340 Ark. 255, 9 S.W.3d 500 (2000).

Cited: Robertson v. State, 256 Ark. 366, 507 S.W.2d 513 (1974); Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977); Hulsey v. State, 261 Ark. 449, 549 S.W.2d 73 (1977); Hobgood v. State, 262 Ark. 725, 562 S.W.2d 41 (1978); Butler v. State, 264 Ark. 243, 570 S.W.2d 272 (1978); Clark v. State, 264 Ark. 630, 573 S.W.2d 622 (1978); Hallman v. State, 264 Ark. 900, 575 S.W.2d 688 (1979); Andrews v. State, 265 Ark. 390, 578 S.W.2d 585 (1979); McGuire v. State, 265 Ark. 621, 580 S.W.2d 198 (1979); Wiman v. State, 266 Ark. 380, 583 S.W.2d 67 (1979); Nicholas v. State, 268 Ark. App. 541, 595 S.W.2d 237 (Ct. App. 1980); Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980); Conley v.

State, 272 Ark. 33, 612 S.W.2d 722 (1981); Curry v. State, 272 Ark. 291, 613 S.W.2d 829 (1981); Sargent v. State, 272 Ark. 336, 614 S.W.2d 503 (1981); Sumlin v. State, 273 Ark. 185, 617 S.W.2d 372 (1981); Derring v. State, 273 Ark. 347, 619 S.W.2d 644 (1981); Harris v. State, 273 Ark. 355, 620 S.W.2d 289 (1981); Thomerson v. State, 274 Ark. 17, 621 S.W.2d 690 (1981); Jones v. State, 275 Ark. 12, 627 S.W.2d 6 (1982); Ford v. State, 276 Ark. 98, 633 S.W.2d 3 (1982); Perry v. State, 277 Ark. 357, 642 S.W.2d 865 (1982); Lear v. State, 278 Ark. 70, 643 S.W.2d 550 (1982); Long v. State, 280 Ark. 327, 657 S.W.2d 551 (1983); Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983); Spears v. State, 280 Ark. 577, 660 S.W.2d 913 (1983); Hickerson v. State, 282 Ark. 217, 667 S.W.2d 654 (1984); Pruett v. State, 282 Ark. 304, 669 S.W.2d 186 (1984); Reed v. State, 282 Ark. 492, 669 S.W.2d 192 (1984); Berna v. State, 282 Ark. 563, 670 S.W.2d 434 (1984); McDaniel v. State, 283 Ark. 352, 676 S.W.2d 732 (1984); Ruiz v. Lockhart, 754 F.2d 254 (8th Cir. 1985); Penn v. State, 284 Ark. 234, 681 S.W.2d 307 (1984); Sherron v. State, 285 Ark. 8, 684 S.W.2d 247 (1985); Hoback v. State, 286 Ark. 153, 689 S.W.2d 569 (1985); Richard v. State, 286 Ark. 410, 691 S.W.2d 872 (1985); Sims v. State, 286 Ark. 476, 695 S.W.2d 376 (1985); Burnett v. State, 287 Ark. 158, 697 S.W.2d 95 (1985); Snell v. State, 287 Ark. 264, 698 S.W.2d 289 (1985); Orr v. State, 288 Ark. 118, 703 S.W.2d 438 (1986); Futch v. State, 288 Ark. 323, 705 S.W.2d 11 (1986); Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986); Williams v. State, 289 Ark. 69, 709 S.W.2d 80 (1986); Baker v. State, 289 Ark. 430, 711 S.W.2d 816 (1986); Hughes v. State, 289 Ark. 522, 712 S.W.2d 308 (1986); Parker v. State, 290 Ark. 158, 717 S.W.2d 800 (1986); Watson v. State, 290 Ark. 484, 720 S.W.2d 310 (1986); Henderson v. State, 291 Ark. 138, 722 S.W.2d 842 (1987); McDougald v. State, 295 Ark. 276, 748 S.W.2d 340 (1988); Ford v. State, 297 Ark. 77, 759 S.W.2d 556 (1988); Neal v. State, 298 Ark. 565, 769 S.W.2d 414 (1989); Ruiz v. State, 299 Ark. 144, 772 S.W.2d 297 (1989); Rodriquez v. State, 299 Ark. 421, 773 S.W.2d 821 (1989); Burnett v. State, 302 Ark. 279, 790 S.W.2d 137 (1990); Pilcher v. State, 303 Ark. 335, 796 S.W.2d 845 (1990); Smith v. State, 303 Ark. 524, 798 S.W.2d 94 (1990); Jackson v. State, 306 Ark. 70, 811 S.W.2d 299 (1991); Moore v. State, 317 Ark. 630, 882 S.W.2d 667 (1994); Byrum v. State, 318 Ark. 87, 884 S.W.2d 248 (1994); Garrison v. State, 319 Ark. 617, 893 S.W.2d 763 (1995); Bell v. State, 324 Ark. 258, 920 S.W.2d 821 (1996); Isbell v. State, 326 Ark. 17, 931 S.W.2d 74 (1996); Lee v. State, 327 Ark. 692, 942 S.W.2d 231 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 572, 139 L. Ed. 2d 412 (1997); Robinson v. State, 353 Ark. 372, 108 S.W.3d 622 (2003).

16-91-114. Acquittal as bar to prosecution.

A judgment in favor of the defendant which operates as a bar to a future prosecution of the offense shall not be reversed by the Supreme Court.

History. Crim. Code, § 331; C. & M. Dig., § 3412; Pope's Dig., § 4255; A.S.A. 1947, § 43-2722.

Cross References. Acquittal barring prosecution, RAP-Crim 9.

CASE NOTES

Analysis

Charge punishable by imprisonment.
Misdemeanors.

Charge Punishable by Imprisonment.

Arkansas Supreme Court cannot reverse case where defendant was acquitted of charge punishable by imprisonment. State v. Binkley, 123 Ark. 240, 185 S.W. 279 (1916); State v. Boatright, 192 Ark. 1100, 96 S.W.2d 775 (1936).

Misdemeanors.

Where a defendant indicted for a misdemeanor punishable by fine only has been tried, acquitted and the judgment reversed and cause remanded, he may be tried again upon the same indictment.

Jones v. State, 15 Ark. 261 (1854); State v. Czarnikow, 20 Ark. 160 (1859).

Cited: State v. Harvest, 26 Ark. App. 241, 762 S.W.2d 806 (1989).

16-91-115. Affirmance of death sentence.

When a judgment of death has been affirmed and the day of execution has passed, the Clerk of the Supreme Court shall transmit to the Governor a certificate of the affirmance and of the judgment, to the end that a warrant for the execution of the judgment may be issued by the Governor.

History. Crim. Code, § 337; C. & M. Dig., § 3415; Pope's Dig., § 4258; A.S.A. 1947, § 43-2724.

CASE NOTES

Cited: Leggett v. State, 231 Ark. 13, 328 S.W.2d 252 (1959).

16-91-116. Proceedings on reversal and new trial.

(a) Upon a mandate of reversal ordering a new trial being filed in the clerk's office of the circuit court in which the judgment of confinement in the Department of Correction was rendered and executed, the clerk shall deliver to the sheriff a copy of the mandate and precept, authorizing and commanding the sheriff to bring the defendant from the Department of Correction to the county jail, which shall be obeyed by the sheriff and Director of the Department of Correction.

(b) If the defendant is again convicted upon the new trial the period of his or her former confinement in the Department of Correction shall be deducted by the court from the period of confinement fixed in the last verdict of conviction.

History. Crim. Code, §§ 335, 336; C. & M. Dig., §§ 3419, 3420; Pope's Dig., §§ 4262, 4263; A.S.A. 1947, §§ 43-2727, 43-2728; Acts 2005, No. 1994, § 285.

Amendments. The 2005 amendment substituted "Department of Correction" for "penitentiary" throughout this section; substituted "the sheriff" for "him" following "commanding" in (a); and inserted "or her" in (b).

Cross References. Deduction of confinement under prior conviction, RAP-Crim 12.

Proceedings on reversal, RAP-Crim 11.

CASE NOTES

Credit for Former Confinement.

Defendant was entitled to credit for time spent in penitentiary, but not for time spent in jail. Kimble v. State, 246 Ark. 407, 438 S.W.2d 705 (1969).

Provision of this section dealing with giving credit upon second conviction for time already served in penitentiary for same offense will be applied where the first conviction is set aside by circuit court. Kimble v. State, 246 Ark. 407, 438 S.W.2d 705 (1969).

Cited: Kimble v. State, 246 Ark. 407, 438 S.W.2d 705 (1969).

16-91-117. Supreme Court's decisions binding.

The decisions of the Supreme Court shall be obligatory on the circuit courts as being the correct expositions of the law.

History. Crim. Code, § 337; C. & M. Dig., § 3417; Pope's Dig., § 4260; A.S.A. 1947, § 43-2729.

16-91-118. [Repealed.]

Publisher's Notes. This section, concerning misdemeanors, was repealed by Acts 2005, No. 1994, § 510. The section was derived from Crim. Code, §§ 339, 342, 344; C. & M. Dig., §§ 3421, 3425-3427; Pope's Dig., §§ 4264, 4268-4270; A.S.A. 1947, §§ 43-2730, 43-2733, 43-2735.

Subchapter 2 — Post-Conviction

SECTION.
16-91-201. Access to files.
16-91-202. Capital cases.
16-91-203. Applicability of subchapter.
16-91-204. Legislative intent.
16-91-205. Severability.
16-91-206. Short title.

Effective Dates. Acts 1997, No. 925, § 10: Mar. 31, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the current system for carrying out a sentence of death is hopelessly fraught with endless litigation in state and federal court which undermines the deterrent value of the death penalty and imposes a needless financial burden on the state's resources, while depriving death row inmates of the right to obtain speedy relief on any meritorious constitutional claims. It is further found that the provisions of the federal Antiterrorism and Effective Death Penalty Act of 1996 provide significant restrictions on the amount of time federal courts may take to review such cases if the states provide a mechanism for the appointment, compensation, and reimbursement of competent counsel for all indigent capital defendants in state post-conviction proceedings. The most significant delay between sentencing and execution occurs while capital cases await decision in federal habeas corpus litigation. From 1990 through 1993, the average time that prisoners sentenced to death in this state awaited execution was ten years and two months for those prisoners who pursued federal habeas corpus litigation. However, if the states comply with the requirements of the Antiterrorism Act, the average time that prisoners will await execution in federal court will be reduced to less than three years in most cases. For that reason an emergency is declared to exist and this act is necessary to permit the state to take advantage of the provisions which will reduce the time for review in federal court by providing a mechanism for the appointment, compensation, and reimbursement of competent counsel for all indigent capital defendants in state post-conviction proceedings. This act, being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-91-201. Access to files.

(a) In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial counsel shall make available to the defendant's state post-conviction counsel the complete files of the defendant's trial counsel, and the defendant's prior counsel on direct appeal shall make available to the defendant's state post-conviction counsel the complete files of the defendant's appellate counsel.

(b) The defendant's post-conviction counsel may inspect and photocopy the files, but the defendant's prior trial and appellate counsel shall maintain custody of their respective files for at least five (5) years following completion of the direct review process in state court, except as to the material which is admitted into evidence in any trial proceedings.

History. Acts 1997, No. 925, § 5.

Publisher's Notes. By Per Curiam dated June 23, 1997, the Supreme Court provided, in part: "[Arkansas Criminal Rule of Procedure] Rule 37.5 shall supersede Sections 5 and 6 of Act 925 (Title 16, Chapter 91, Section 201 and Section 202) except for the last paragraph of subsection 5(c) (§ 16-91-202(c)), which provided for education programs by the Arkansas Public Defender Commission, and all of subsection 5(f) (§ 16-91-202(f)), which provides for the funding of the fees and expenses awarded under the rule through the Arkansas Public Defender Commission."

16-91-202. Capital cases.

(a)(1)(A)(i) If a capital conviction and sentence are affirmed on direct appeal, the circuit court in which the conviction was obtained shall, within two (2) weeks after the affirmance, conduct a hearing and enter a written order appointing counsel to represent the petitioner in a post-conviction proceeding upon issuance of the mandate by the appellate court, should the petitioner desire to pursue such a post-conviction proceeding.

(ii) Counsel's appointment shall remain effective through any appeal of the post-conviction proceeding in state court.

(B) Counsel shall be appointed only after a finding by the court that the petitioner is indigent and that he or she either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel.

(C) The court may decline to appoint counsel for the petitioner only upon a written finding that the petitioner rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the petitioner is not indigent.

(2)(A) The court may not appoint an attorney as counsel under this subsection if the attorney represented the petitioner at trial or on direct appeal of the conviction under attack unless the petitioner and the attorney request appointment on the record.

(B) If counsel is the same attorney who represented the petitioner at trial or on direct appeal, the court shall appoint a second counsel to assist in the preparation of the petition for post-conviction relief.

(C) If the petitioner elects to proceed pro se, the waiver of the assistance of counsel shall be made in open court on the record.

(b)(1)(A) Upon the filing of a post-conviction petition, the clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of the county in which the petition was filed, the Attorney General, and the Executive Director of the Arkansas Public Defender Commission.

(B)(i) The filing of the petition does not automatically stay any sentence of death.

(ii) Upon the entry of an order pursuant to this subsection, a stay of execution shall be granted upon application to the court wherein the motion for appointment of counsel was filed.

(2) The stay granted pursuant to this subsection shall automatically expire if:

(A) The petitioner fails to file a timely petition for post-conviction relief; or

(B) The petitioner is denied relief in his or her post-conviction proceeding in circuit court in the manner set forth in subsection (h) of this section.

(c)(1) The following standards are the exclusive criteria which counsel must satisfy in order to be appointed under subsection (a) of this section.

(2) At least one (1) of the attorneys appointed to represent the applicant:

(A)(i) Shall have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings within the five (5) years immediately preceding the appointment for which he or she is under consideration; or

(ii) Shall have acted, within the five (5) years immediately preceding the appointment for which he is under consideration, as defense counsel in no fewer than three (3) state or federal post-conviction relief proceedings arising from felony convictions, at least two (2) of which involved violent crimes, including one (1) murder case; and

(B) Shall have, within the five (5) years immediately preceding the appointment for which he or she is under consideration, conducted at least two (2) evidentiary hearings in state or federal post-conviction relief proceedings, which may include any proceeding which satisfies subdivisions (c)(2)(A)(i) or (ii) of this section; and

(C) Shall have been licensed to practice law for no fewer than five (5) years, and for at least three (3) of those five (5) years shall have been licensed to practice in Arkansas courts; and

(D) Shall have successfully completed, within the two (2) years immediately preceding the appointment for which he or she is under consideration, not less than six (6) hours of Arkansas Continuing Legal Education Board-approved continuing legal education or professional training primarily involving advocacy in the field of capital trial, capital appellate, or capital post-conviction litigation.

(3) Consistent with § 16-87-204(b)(9), the Executive Director of the Arkansas Public Defender Commission shall offer annually, to any

attorney wishing to attend, no fewer than two (2) in-state conferences or seminars at each of which no less than six (6) hours of Arkansas Continuing Legal Education Board-approved credit, as described in this subsection, is available.

(d)(1) Notwithstanding any statutory provision to the contrary, appointments of counsel in capital post-conviction proceedings and in appeals therefrom shall be made from counsel who qualify for appointment under subsection (c) or (e) of this section.

(2) The presiding judge may contact the Arkansas Public Defender Commission for a list of counsel who meet the criteria of subsection (c) of this section and may appoint counsel from that list.

(3) Neither the commission nor any of its components shall possess any supervisory authority over counsel appointed to represent a petitioner in capital post-conviction proceedings or in appeals therefrom.

(4) Nothing in this section shall preclude the court from appointing an out-of-state attorney pro hac vice as cocounsel, provided that in-state counsel is appointed consistent with the provisions of this subchapter.

(5) Once counsel has been appointed, the presiding judge shall enter a written order specifying the appointed counsel's qualifications which satisfy subsection (c) of this section.

(e)(1) The court may appoint counsel who does not satisfy all of the criteria of subsection (c) of this section only upon a written finding that the attorney is clearly competent and qualified because of his or her unique training, experience, or background to represent an indigent petitioner in a capital post-conviction proceeding.

(2)(A) In all such cases, the attorney shall have been admitted to practice law for not less than five (5) years and shall have had no fewer than three (3) years' experience in the actual handling of capital murder prosecutions or capital murder post-conviction proceedings in Arkansas courts.

(B) In addition, such counsel shall have successfully completed, within the two (2) years immediately preceding the appointment for which he or she is under consideration, fewer than six (6) hours of Arkansas Continuing Legal Education Board-approved continuing legal education or professional training primarily involving advocacy in the field of capital trial, capital appellate, or capital post-conviction litigation.

(3) Prior to appointing such counsel, the court shall conduct a hearing at which the attorney shall demonstrate that his or her experience or other qualifications meet the requirements of this subsection, and the court shall make written findings specifying what unique training, experience, or background qualifies the attorney for appointment under this subsection.

(f)(1) Notwithstanding any other provision of law, the court shall fix the compensation to be paid to attorneys appointed under this subchapter, as well as the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized by the court at such rates or amounts as the court determines to be reasonably necessary.

(2) All compensation and reasonable expenses authorized by the court pursuant to this subchapter shall be paid by the Arkansas Public Defender Commission.

(g)(1) Not later than fifty (50) days after the filing of the petition, the judge shall convene a status conference to schedule a hearing on the petition for post-conviction relief if a hearing is deemed necessary.

(2) The hearing must be conducted within one hundred eighty (180) days from the date of the status conference, unless good cause is shown to justify a continuance.

(h)(1) Within thirty (30) days from the receipt of the transcript from the post-conviction hearing, if a hearing was held, or, if the judge requests post-trial briefs, within thirty (30) days from the receipt of the post-trial briefs, the judge shall make specific written findings of fact and shall expressly state the judge's conclusions of law relating to each issue raised in the petition for post-conviction relief.

(2) In the event no hearing was held, the judge shall, within one hundred twenty (120) days after the filing of the petition for post-conviction relief, make specific written findings of fact and conclusions of law relating to each issue presented in the petition for post-conviction relief.

(i) The transcription of the testimony and record in capital post-conviction proceedings shall be completed within sixty (60) days of the conclusion of the post-conviction hearing and shall immediately be provided to the parties and the Clerk of the Supreme Court of Arkansas.

History. Acts 1997, No. 925, § 5.

Publisher's Notes. By Per Curiam dated June 23, 1997, the Supreme Court provided, in part: "[Arkansas Criminal Rule of Procedure] Rule 37.5 shall supersede Sections 5 and 6 of Act 925 (Title 16, Chapter 91, Section 201 and Section 202) except for the last paragraph of subsection 5(c) (§ 16-91-202(c)), which provided for education programs by the Arkansas Public Defender Commission, and all of subsection 5(f) (§ 16-91-202(f)), which provides for the funding of the fees and expenses awarded under the rule through the Arkansas Public Defender Commission."

Cross References. Special rule for persons under sentence of death, ARCrP 37.5.

CASE NOTES

Review.

Although petitioner's death case had been reviewed five times, the Supreme Court of Arkansas found that the circumstances of the case were unique, recalled the mandate, and reopened the case solely because of: (1) the alleged comparable verdict form deficiency in the Willett v. State case; (2) the federal district court's dismissal of the federal habeas corpus petition in order to give state courts the opportunity to explore the issue; and (3) the enhanced scrutiny required in death cases. Robbins v. State, 353 Ark. 556, 114 S.W.3d 217 (2003).

16-91-203. Applicability of subchapter.

This subchapter applies to all persons under sentence of death, including those whose cases were pending on direct review when this

subchapter was passed, who file their initial applications for state post-conviction relief on or after March 31, 1997.

History. Acts 1997, No. 925, § 6.

16-91-204. Legislative intent.

It is the express intent of this subchapter to comply with the requirements of the federal Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, in an effort to obtain the benefits of that act concerning time limitations in which federal habeas corpus proceedings and appeals must be considered and decided, and for other purposes. Throughout this subchapter, references to "post-conviction" proceedings or petitions refer solely to those proceedings or petitions which are filed pursuant to the state rule or statute in which claims of ineffective assistance of counsel are cognizable, such as Arkansas Rules of Criminal Procedure 37. Specific reference to Rule 37 was avoided only because the General Assembly is aware that the form of relief provided for by that rule may, at some point in the future, be provided for by a different rule or statute. It is the intent of the General Assembly to ensure that this subchapter apply to Rule 37-type post-conviction proceedings, not to post-conviction proceedings in which claims of ineffective assistance are not cognizable. It is the intent of § 16-91-202(e) to allow the appointment of counsel in the very limited circumstance in which, because of unique training, experience, or background, an attorney is clearly competent and qualified to represent an indigent petitioner in a capital post-conviction proceeding, but otherwise does not meet all of the criteria of § 16-91-202(c). Section 16-91-202(e) was created for the specific purpose of permitting the appointment of experienced attorneys, including but not limited to, former prosecutors and judges who, because of the nature of their practice, are uniquely qualified to represent capital defendants but do not meet the specific defense-related requirements of § 16-91-202(c).

History. Acts 1997, No. 925, § 2.

U.S. Code. The Antiterrorism and Effective Death Penalty Act of 1996, referred to in this section, is codified as 8 U.S.C. §§ 1105a, 1182, 1225, 1252, 1252a, 18 U.S.C. § 2332, 3663, a note under 18 U.S.C. § 1 and a note under Chapter 22, Title 28.

CASE NOTES

Scope of Review.

Were the Supreme Court of Arkansas to refuse to examine a claim that fundamental error is overlooked in a death case, where within the past eight years the Supreme Court of Arkansas has reversed a death sentence for an error in the jury verdict forms, in Willett v. State, the Court would not be fulfilling its obligation to complete a thorough state review under Arkansas rules and state law. Robbins v. State, 353 Ark. 556, 114 S.W.3d 217 (2003).

16-91-205. Severability.

(a) If any provision of this subchapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are declared to be severable.

(b) In the event that any provision of this subchapter is found to be an invalid encroachment upon the rule-making authority of the Supreme Court of Arkansas, that provision shall be deemed to be a resolution of the General Assembly recommending the adoption of the provision by court rule.

History. Acts 1997, No. 925, § 8.

16-91-206. Short title.

This subchapter is known and may be cited as the "Arkansas Effective Death Penalty Act of 1997".

History. Acts 1997, No. 925, § 1.

CHAPTER 92

COSTS, FEES, FINES, ETC.

SECTION.
16-92-101. Costs and fees — Defendant's property bound from time of arrest.
16-92-102. Costs and fees — Execution.
16-92-103. Costs and fees — Severed defendants.
16-92-104. Costs and fees — Capital cases.
16-92-105. Costs and fees — Liability of county.
16-92-106. Costs and fees — Justices of the peace.
16-92-107. [Repealed.]
16-92-108. [Repealed.]
16-92-109. Costs and fees — Reimbursement to counties.
16-92-110, 16-92-111. [Repealed.]
16-92-112. Costs and fees — Liability of state.
16-92-113. [Repealed.]
16-92-114. Fines — Abstract.
16-92-115, 16-92-116. [Repealed.]
16-92-117. Enhancement of the rate of collection of fine revenue.

A.C.R.C. Notes. Acts 2003, No. 1741, § 1, provided: "(a) In those counties with a population between forty thousand (40,000) and forty-one thousand (41,000) according to the 2000 federal decennial census, the circuit courts shall assess, at the time of sentencing, a mandatory fine of one hundred dollars ($100) for all felony violations of state law that shall be deposited into the county general fund of the county in which the court sits and appropriated by the local quorum court to provide and compensate circuit court bailiffs.

"(b) The compensation package of the bailiffs provided under subsection (a) of this section shall be determined by the local quorum court."

Cross References. Fees generally, § 21-6-101 et seq.

Fines and costs, § 5-4-201 et seq.

Judgment for costs, RAP-Crim 13.

Effective Dates. Acts 1848, § 4, p. 41: effective on passage.

Acts 1875, No. 77, § 53: effective on passage.

Acts 1875 (Adj. Sess.), No. 58, § 15: effective on passage.

Acts 1883, No. 114, § 226: effective on passage.

Acts 1889, No. 4, § 2: effective on passage.

Acts 1925, No. 116, § 2: effective on passage. Emergency declared. Approved Feb. 27, 1925.

Acts 1929, No. 231, § 2: Mar. 27, 1929. Emergency clause provided: "On account of the fact that there are many innocent holders of property whose title thereto might be insecure, and the Act being necessary to preserve the public peace, health and safety, an emergency is hereby declared to exist and the Act shall be in full force and effect from and after its passage and approval."

Acts 1951, No. 31, § 6: approved Jan. 31, 1951. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of the State of Arkansas: (1) that traffic accidents resulting in injuries and deaths to persons and damages to property are increasing at an alarming rate, due in part to increased use of the highways; (2) that present appropriations and revenues for employment of personnel in the Department of Arkansas State Police are wholly inadequate to properly handle the problem of highway safety; and (3) that only the provisions of this act will provide funds in amounts sufficient to employ the necessary personnel to patrol the highways and thereby reduce the incidence of highway accidents. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of public peace, health and safety shall take effect and be in full force from and after its passage."

Acts 1969, No. 194, § 2: Mar. 7, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Policemen's Pension and Relief Fund in many cities is in dire need of additional funds to finance the fund; that many cities have not established a Policemen's Pension and Relief Fund but that such cities probably would establish such fund if additional funds were available to finance such Fund; that this Act is immediately necessary to provide additional funds for the benefit of policemen in the cities and towns of this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in effect from the date of its passage and approval."

Acts 1970 (Ex. Sess.), No. 151, § 4: became law without Governor's signature, Mar. 28, 1970. Emergency clause provided: "It has been found and determined by the Sixty-Seventh General Assembly meeting in an Extraordinary Session that certain moneys being deposited in the State Treasury for credit to the State Police Retirement Fund are currently classified as 'special revenues' being subject to a 1½% deduction; that this deduction has deprived the Retirement System of approximately $35,000.00 during the past decade; that these moneys should be classified as 'Trust Fund Income,' therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 24, § 6: Feb. 1, 1979. Emergency clause provided: "It is hereby found and declared by the General Assembly of the State of Arkansas that expenses incurred by the counties of this State in conducting trials for persons charged with felonies are great in many instances, that the expenses incurred by counties in the trials of persons charged with escape from the Arkansas Department of Corrections are great, that all these expenses are a serious financial drain on the resources of the counties, that there is a need for immediate financial assistance to counties responsible for the expenses of these trials and that enactment of this legislation will provide immediate financial assistance to counties which will be responsible for these expenses. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from the date of its approval."

Acts 1980 (1st Ex. Sess.), No. 39, § 3: Jan. 25, 1980. Emergency clause provided: "It is hereby found and determined by the 72nd General Assembly, meeting in Extraordinary Session, that by mistake, Act 24 of 1979 was not provided moneys with which to fulfill the State's commitments to counties on account of trial expenses and that without this assistance, certain counties would suffer severe financial hardships. Therefore, an emer-

gency is hereby declared to exist and this Act being necessary to protect the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1981, No. 325, § 4: Mar. 4, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that under present law, the court costs payable to the Arkansas State Police Retirement Fund are not immediately available for investment and, thus, such funds should be deposited in a bank account to correct this problem. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 621, § 9: became law without Governor's signature, Mar. 27, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the operation of the prosecuting attorney's office of the Sixth Judicial District of the State of Arkansas is essential to the efficient and proper administration of justice in said Sixth Judicial District, and further determined that the deputies, the salaries thereof, and other allowances provided in this Act are deemed essential and necessary for the operation of the prosecuting attorney's office of the Sixth Judicial District. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 185, § 6: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the appropriation Act accompanying this Act goes into effect on July 1, 1987; that this Act should go into effect on the same date as the companion appropriation Act and that unless this emergency clause is adopted, this Act may not go into effect until after July 1, 1987. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1987."

Acts 1991, No. 904, § 28: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the language of certain court cost statutes lacks uniformity; that such lack of uniformity is detrimental to the proper collection of such court costs; and that such language should be standardized to promote the proper collection of such costs. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1193, § 21: July 1, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that the decision of the Arkansas Supreme Court in State v. Post et al, Case No. 92-787, has created great uncertainty regarding the payment of the legal fees and expenses in connection with the legal representation of indigent persons charged with crimes punishable by imprisonment and that delay in the effective date of this act beyond July 1, 1993, would cause irreparable harm to the proper implementation of a statewide public defender program. Therefore, and emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993."

RESEARCH REFERENCES

ALR. Right of indigent criminal defendant to polygraph test at public expense. 11 ALR 4th 733.

Am. Jur. 20 Am. Jur. 2d, costs, § 1 et seq.

C.J.S. 20 C.J.S., Costs, § 1 et seq.

16-92-101. Costs and fees — Defendant's property bound from time of arrest.

(a) The property, both real and personal, of any person charged with a criminal offense shall be bound from the time of his or her arrest or the finding of an indictment against him or her, whichever shall first happen, for the payment of all fines and costs which he or she may be adjudged to pay. However, no such lien shall be enforced unless the county judge of the county in which the judgment is rendered on the criminal charge shall file, or cause to be filed, with the circuit clerk of the county in which the person may own property, and within six (6) months after the rendition of judgment against the person, a notice of lis pendens as provided for in §§ 16-59-101 — 16-59-105, 16-59-107, and 16-66-402 and shall cause suit to be instituted to enforce the lien within two (2) years after the date of the filing of the notice.

(b) The filing of a suit within the time prescribed for filing the notice shall be sufficient compliance with the requirements as to notice.

History. Rev. Stat., ch. 45, § 202; C. & M. Dig., § 3270; Acts 1929, No. 231, § 1; Pope's Dig., § 4116; A.S.A. 1947, § 43-2403.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law, Criminal Law, 1 UALR L.J. 153.

CASE NOTES

Analysis

Lien.
Return of money.
Third party claimants.

Lien.

This section creates a lien in favor of the state upon the property of the accused, wheresoever it may be found within the limits of the state, which binds it not only in his hands, but of any person in possession, from the time of arrest or indictment found until the accused is discharged or the fines and costs adjudged against him are paid; but this section does not confiscate the property or divest defendant of the possession and use of it during the prosecution. Lawson v. Johnson & Ashley, 5 Ark. 168 (1843).

A homestead is not subject to a lien for costs. Hollis v. State, 59 Ark. 211, 27 S.W. 73 (1894).

This section creates a lien on all property of defendant from time of his arrest, and gathers within its sweep all property owned by him until the judgment subsequently rendered is paid. Western Tie & Timber Co. v. Campbell, 113 Ark. 570, 169 S.W. 253 (1914).

The imposition of the fine constituted a judgment which became a lien on all property of appellant owned or acquired at any time after his arrest. Cherry v. Hall, 251 Ark. 305, 472 S.W.2d 225 (1971).

Return of Money.

Money taken from defendant at the time of his arrest, except for a marked bill, should have been returned upon a signed receipt identifying the amount and kind of bills. Powell v. State, 260 Ark. 381, 540 S.W.2d 1 (1976).

Third Party Claimants.

Unappealed adjudication that county had a lien on automobile was a bar to equity suit for possession of the automobile instituted by third party claimant who had intervened in the adjudicated case. New Amsterdam Cas. Co. v. O'Dell, 193 Ark. 246, 98 S.W.2d 953 (1936).

16-92-102. Costs and fees — Execution.

(a) The clerk of the court, at the end of each term, shall issue executions for all fines imposed on indictments, in penal actions, or otherwise, and for the costs of conviction in criminal cases during the term, and remaining unpaid, which shall be executed in the same manner as executions in civil cases. The property of the defendant may be seized and sold, notwithstanding that he or she may be in custody for the same demand.

(b) In every case where a witness is summoned by a special subpoena to testify in a particular case in which an indictment may be found, it shall be the duty of the clerk to tax the attendance of the witness with the cost of the suit, to be collected from the defendant, in the event that judgment shall be rendered against him or her therefor, and to be paid into the county treasury.

History. Rev. Stat., ch. 45, § 203; Acts 1857, § 2, p. 131; Crim. Code, § 296; C. & M. Dig., § 3271; Pope's Dig., § 4117; A.S.A. 1947, § 43-2404.

Cross References. Collection after default, § 5-4-204.

CASE NOTES

Cited: Hudmon v. Coonfield, 239 Ark. 1063, 396 S.W.2d 296 (1965); Cherry v. Hall, 251 Ark. 305, 472 S.W.2d 225 (1971).

16-92-103. Costs and fees — Severed defendants.

Where two (2) or more defendants are joined in one (1) indictment and shall sever in the trial, the costs which shall have accrued before the severance shall be adjudged against such of the defendants as may have been convicted, and the costs thereafter accruing shall be apportioned and adjudged accordingly.

History. Rev. Stat., ch. 45, § 198; C. & M. Dig., § 3269; Pope's Dig., § 4115; A.S.A. 1947, § 43-2402.

16-92-104. Costs and fees — Capital cases.

The costs in all cases of conviction where the convict may be sentenced to suffer death, and all expenses attending the execution of the sentence, shall be adjudged and taxed by the court and paid out of the estate of the convict, and execution may be issued against the estate of the convict therefor.

History. Rev. Stat., ch. 45, § 197; C. & M. Dig., § 3268; Pope's Dig., § 4114; A.S.A. 1947, § 43-2401.

16-92-105. Costs and fees — Liability of county.

(a) Fees allowed in criminal cases shall be paid by the defendant, but if sufficient property belonging to the defendant cannot be found for that purpose, the fees shall be paid by the county where the conviction is had, except in cases of misdemeanors, when the county shall not be liable.

(b) In all criminal or penal cases pending under indictment in the circuit courts, if the defendant shall be acquitted or if nolle prosequi shall be entered by the prosecuting attorney, except in cases where the prosecutor shall be adjudged to pay the costs or, in cases of felony, if the defendant shall be convicted and shall not have the property to pay the costs, the costs shall be paid by the county.

(c) The county shall not be liable for costs when the defendant is convicted until execution shall have been issued against the property of the convict and returned unsatisfied for the want of property to satisfy the costs; unless the court in which the trial was held shall certify that, in the opinion of the court, the costs cannot be made out of the property of the defendant.

(d) Whenever the county shall be liable to pay the costs and expenses in criminal cases, the circuit court for the county in which the case was held shall adjust the costs and expenses and cause them to be certified to the county court.

History. Rev. Stat., ch. 45, §§ 205-207; Acts 1875, No. 77, § 5, p. 167; 1889, No. 4, § 1, p. 3; C. & M. Dig., §§ 3272-3275; Pope's Dig., §§ 4118-4120, 4123; A.S.A. 1947, §§ 43-2405 — 43-2408.

CASE NOTES

Analysis

Adjustment and certification.
Allowance of claims.
Bond.
Cases of felony.
Collection.
Fines imposed prior to incumbency.
Liability of sheriff.
Method of payment.
Misdemeanors.

Adjustment and Certification.

County court could not allow a claim for costs in a criminal case not certified by the circuit court trying the cause. Peay v. Searcy County, 104 Ark. 133, 148 S.W. 500 (1912).

While the county is liable for costs in an unsuccessful criminal prosecution, the sole remedy of one attempting to collect such costs is by the procedure of subsection (d). Powell v. State, 233 Ark. 438, 345 S.W.2d 8 (1961).

Allowance of Claims.

Certain claims were allowable out of current revenue, and not out of the revenue of previous years, and could still be paid out of that revenue in subsequent years if there was a sufficient surplus. Poinsett County v. Lady, 199 Ark. 657, 135 S.W.2d 665 (1940).

Bond.

The taking of a bond not in conformity with the statutory requirements does not acquit the officer of liability for fines and costs. Wilson v. White, 82 Ark. 407, 102 S.W. 201 (1907).

Cases of Felony.

The words "cases of felony" refer to cases where the indictment and trial is for a felony, including those cases where conviction is for a misdemeanor of the same generic class as the felony. Smith v. State, 105 Ark. 58, 150 S.W. 149 (1912).

Collection.

In felony cases, the clerk cannot demand fees in advance. Jordan v. State, 102 Ark. 43, 143 S.W. 131 (1912).

Sheriff was not entitled to credit on gross receipts of his office for fees earned by him in misdemeanor cases but not collected. Miller County v. Sewell, 192 Ark. 808, 94 S.W.2d 1042 (1936).

In misdemeanor cases, the county is not liable for justice's fees, and the justice of the peace could only recover his fee if the accused was convicted, which amounted to a violation of due process. Doty v. Goodwin, 246 Ark. 149, 437 S.W.2d 233 (1969).

The fact that a justice of the peace may have a pecuniary interest in the conviction of a defendant in a misdemeanor case does not prevent him exercising jurisdiction if he elects to serve without compensation upon either conviction or acquittal. Doty v. Goodwin, 246 Ark. 149, 437 S.W.2d 233 (1969).

Fines Imposed Prior to Incumbency.

It is the duty of a sheriff to collect all fines imposed during the incumbency of his predecessor in office and which have not been paid. Wilson v. Chaney, 117 Ark. 287, 174 S.W. 564 (1915).

Liability of Sheriff.

Where the sheriff has in his custody a prisoner against whom a fine has been adjudged, it is his duty to collect the fine and he is chargeable with and liable therefor. Wilson v. Chaney, 117 Ark. 287, 174 S.W. 564 (1915).

Method of Payment.

The authority of the sheriff to accept a note or bond for the payment of a fine and costs could have been utilized to provide an instalment payment system for those whose payments were secured by solvent surety. Cherry v. Hall, 251 Ark. 305, 472 S.W.2d 225 (1971).

Misdemeanors.

If one accused of a felony is tried and acquitted of the felony but convicted of a misdemeanor of the same generic class included in the indictment, the county is liable for costs if the accused has no property out of which a judgment for costs can be made. Boone County v. Mitchell, 64 Ark. 125, 40 S.W. 784 (1897); Smith v. State, 105 Ark. 58, 150 S.W. 149 (1912).

Cited: Hempstead County v. Harkness, 73 Ark. 600, 84 S.W. 799 (1905); Union County v. Warner Brown Hosp., 297 Ark. 460, 762 S.W.2d 798 (1989).

16-92-106. Costs and fees — Justices of the peace.

(a) In all cases of felony where complaint shall be made before any justice of the peace or other officer, and the party against whom the complaint shall be made shall, upon a hearing thereof, be discharged, committed to jail, or bound over for his or her appearance at the circuit court, the justice or other officer or person to whom any fees may be due shall make out a fee bill for his or her costs allowed by law which may have accrued in the case. He or she shall present to the county court an itemized account, duly sworn to, which shall be examined as provided in subsection (b) of this section and, if found correct, audited and allowed by the county court.

(b) It shall be the duty of the county court to carefully examine the fee bills, and it may, in its discretion, summon witnesses to enable it to ascertain the correctness and validity of the fee bills. If, upon examination and investigation, the court shall be of the opinion that the fee bills are not authorized by law or are based upon frivolous, malicious, or unauthorized prosecutions improperly allowed by any magistrate, then the court may reduce, modify, or wholly disallow the fee bills.

History. Acts 1875, No. 77, §§ 36, 37, p. 167; 1875 (Adj. Sess.), No. 58, § 13, p. 103; C. & M. Dig., §§ 4603, 4604; Pope's Dig., §§ 5692, 5693; A.S.A. 1947, §§ 43-2412, 43-2413.

CASE NOTES

Analysis

Mayor as justice of peace.
Violations of ordinances.
Verification of fee bills.

Mayor as Justice of Peace.

If the mayor sits as a justice of the peace, the fine goes to the county. Incorporated Town of Pocohantas v. State ex rel. Randolph County, 114 Ark. 448, 170 S.W. 89 (1914).

Violations of Ordinances.

An incorporated town is entitled to fines collected in the mayor's court for violations of ordinances imposing penalties for acts which are also offenses against the state. Town of Hackett City v. State ex rel. Greenwood Dist., 56 Ark. 133, 19 S.W. 426 (1892); Incorporated Town of Pocohontas v. State ex rel. Randolph County, 114 Ark. 448, 170 S.W. 89 (1914).

Verification of Fee Bills.

This section excludes the operation of the general law providing the method of verifying claims against counties. Saline County v. Kinkead, 84 Ark. 329, 105 S.W. 581 (1907).

Cited: Cobb v. Jackson County, 64 Ark. 162, 41 S.W. 322 (1897).

16-92-107. [Repealed.]

Publisher's Notes. This section, concerning costs, fees and prosecuting attorney information before justice of the peace, was repealed by Acts 2003, No. 1185, § 217. The section was derived from Acts 1925, No. 116, § 1; Pope's Dig., § 10887; A.S.A. 1947, § 43-2411.

16-92-108. [Repealed.]

Publisher's Notes. This section, concerning fee caps for attorneys appointed to represent indigent persons, was repealed by Acts 1993, No. 1193, § 20. The section was derived from Acts 1977, No. 246, § 1; 1985, No. 1076, § 1; A.S.A. 1947, § 43-2419. For present law, see § 14-20-102.

16-92-109. Costs and fees — Reimbursement to counties.

(a)(1) As used in this section, "costs incurred by the county" means all costs incurred by the county in bringing to trial or trials any person or persons charged with a felony offense, with a crime committed in furtherance of, or in connection with, an escape from the Department of Correction, or with escape from the Department of Correction.

(2) Costs shall include, but shall not be limited to, salaries and expenses, except normal salaries and expenses incurred by the prosecuting attorney in investigation and prosecution, by the sheriff in investigation and custody, and by the public defender or court-appointed attorney or attorneys in investigation and defense, as well as all other costs, including the expenses involved in the trial itself.

(3) Expenses shall also include extraordinary expenses for such services as witness fees and expenses, court-appointed expert witnesses, reporter fees, costs of preparing transcripts, necessary courtroom security reasonably required to protect the court and participants, and other direct trial costs.

(4) Trial shall be deemed to include all pretrial hearings and post-conviction proceedings, if any.

(b) Whenever a trial is held in which a crime committed in furtherance of, or in connection with, an escape from the Department of Correction is charged or whenever a trial is held for escape from the custody of the Department of Correction, the county or counties responsible for the trial or trials of the person or persons charged may apply to the Director of the Department of Finance and Administration for reimbursement of the total costs incurred by the county or counties in each case.

(c)(1) The county responsible for the costs of the felony proceedings or trial on charges of escape or in connection with escape from the Department of Correction, shall prepare a statement of all costs incurred in connection with the proceedings, which shall be certified by the presiding judge of the circuit court or courts.

(2) The statement of costs incurred by the county or counties shall be sent to the Director of the Department of Finance and Administration together with the county's application for reimbursement.

(d)(1) The Director of the Department of Finance and Administration shall audit and examine all statements of costs incurred by the county received by him or her in accordance with this section and shall determine whether the costs included in the statements comply with the provisions of this section.

(2) The Director of the Department of Finance and Administration shall cause the amount of such costs as he determines comply with this section to be paid to the county or counties from the Trial Expense Assistance Fund, which is established by this section on the books of the Treasurer of State, the Director of the Department of Finance and Administration, and the Auditor of State, which shall consist of moneys transferred to it, as costs are incurred, from the Miscellaneous Revolving Fund.

(e) The Director of the Department of Finance and Administration may make disbursements from the Trial Expense Assistance Fund to pay court-awarded attorney's fees and costs to court-appointed attorneys for indigent defendants.

History. Acts 1979, No. 24, §§ 1-5; 1980 (1st Ex. Sess.), No. 39, § 1; 1985, No. 419, § 1; A.S.A. 1947, §§ 43-2408.1 — 43-2408.5; Acts 1993, No. 793, § 1; 1993, No. 1193, § 20.

RESEARCH REFERENCES

UALR L.J. Heller and Sallings, Survey of Public Law, 3 UALR L.J. 296.

CASE NOTES

Expenses.

Although no guidelines governing the payment of experts and investigative expenses are given by this section, the decision concerning the award of reasonable expenses rests within the sound discretion of the trial court. State v. Crittenden County, 320 Ark. 356, 896 S.W.2d 881 (1995).

16-92-110, 16-92-111. [Repealed.]

Publisher's Notes. These sections, concerning costs and fees generally and judicial district prosecuting attorneys for counties over 200,000 population, were repealed by Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. They were derived from the following sources:

16-92-110. Acts 1951, No. 31, § 4; 1959, No. 487, § 1; 1969, No. 194, § 1; 1970 (Ex. Sess.), No. 151, §§ 1, 2; 1981, No. 325, § 1; 1981, No. 434, § 1; A.S.A. 1947, §§ 43-2414 — 43-2414.2; Acts 1991, No. 904, §§ 12, 20; 1993, No. 113, § 1; 1993, No. 325, § 1; 1993, No. 1234, § 1.

16-92-111. Acts 1985, No. 621, § 4; A.S.A. 1947, § 43-2414n; Acts 1991, No. 904, §§ 13, 20.

16-92-112. Costs and fees — Liability of state.

(a) The costs in all state prosecutions for any offenses which may be committed in or in respect of the penitentiary shall be paid out of the State Treasury.

(b) In the cases mentioned in subsection (a) of this section, it shall be the duty of the judge to cause to be made out an accurate bill of costs therein and to certify to its correctness; it shall be the duty of the Auditor of State to draw his or her warrant for the amount when an appropriation shall be made therefor.

History. Acts 1848, §§ 1-3, p. 41; C. & M. Dig., §§ 3276, 3277; Pope's Dig., §§ 4124, 4125; A.S.A. 1947, §§ 43-2409, 43-2410.

16-92-113. [Repealed.]

Publisher's Notes. This section, concerning fines and disposition, was repealed by Acts 2003, No. 134, § 1. The section was derived from Acts 1883, No. 114, § 212, p. 199; C. & M. Dig., § 10183; Pope's Dig., § 13966; A.S.A. 1947, § 43-2501.

16-92-114. Fines — Abstract.

(a) At the close of the term of each circuit court, the clerk of the court shall furnish to the clerk of the county court an official abstract of all fines, penalties, and forfeitures adjudged against defendants during the term of the circuit court.

(b) The abstract shall contain the style of each case, the full name of the parties, and amount of each fine, and the penalty and forfeiture separately.

History. Acts 1883, No. 114, § 219, p. 199; C. & M. Dig., § 10190; Pope's Dig., § 13973; A.S.A. 1947, § 43-2502.

16-92-115, 16-92-116. [Repealed.]

Publisher's Notes. These sections, concerning fines and duties of sheriffs and circuit clerks and additional court costs and disposition and use of funds, were repealed by Acts 2003, No. 1765, § 24, and Acts 1995, No. 1256, § 20, as amended by Acts 1995 (1st Ex. Sess.), No. 13, § 4. The sections were derived from:

16-92-115: Acts 1883, No. 114, §§ 220, 222, 223, p. 199; C. & M. Dig., §§ 10191, 10193, 10194; Pope's Dig., §§ 13974, 13976, 13977; A.S.A. 1947, §§ 43-2503 — 43-2505; Acts 1987, No. 129, §§ 1, 2.
16-92-116: Acts 1987, No. 185, §§ 1-4.

16-92-117. Enhancement of the rate of collection of fine revenue.

(a) For purposes of this section, the term "fine" or "fines" means all monetary penalties imposed by the district courts of this state, which include fines payable to the county general fund, the city general fund, and other state agencies, court costs, probation fees, and public service work supervisory fees.

(b)(1) The Supreme Court Committee on Automation shall prescribe, in cooperation with the Administrative Office of the Courts, the Division of Legislative Audit, the Association of Arkansas Counties, and the Arkansas Municipal League, appropriate forms for the reporting and allocation of all fines and such other information relevant to the income received by the various state, county, and city entities from district courts.

(2) Each district court in this state, if requested, shall provide this information to the committee for the twelve-month period immediately preceding the installation of the computer hardware and software as required by contract for the district court automation system.

(c)(1)(A) The state agency or entity which receives fine revenue from a district court in which this system is installed may contract with the vendor or private contractor selected by the committee to pay a percentage of any increased fine revenue to the vendor or private contractor to be used for the maintenance and operation of the system.

(B) The percentage to be received by the vendor or private contractor shall be agreed upon in advance by the state agency or entity affected.

(2)(A) The county quorum court or the governing body of the city in which a court having the system installed is located, or both, may contract with the vendor or private contractor selected by the committee to pay a percentage of any increased fine revenue to the vendor or private contractor to be used for the maintenance and operation of the system.

(B) The percentage to be received by the vendor or private contractor shall be agreed upon in advance by the county quorum court or the governing body of the city in which the court is located, or both.

(3)(A)(i) Each district court in which the system is installed shall submit a report to the state agency or entity affected, either the county quorum court or the governing body of the city in which the court is located, or both, for each twelve-month period immediately following installation of the system.

(ii) This report shall be compared to the fine revenue received for the twelve-month period immediately preceding installation of the system which shall be the base year.

(B) The dollar amount of increase in fine revenue in each of the twelve-month periods immediately following installation of the sys-

tem shall be compared to the twelve-month period immediately preceding installation.

(C)(i) The dollar amount of increase in fine revenue as determined in this section shall be the basis for determining the funds due the vendor or private contractor for each year that the system is in operation.

(ii) This amount shall be determined within forty-five (45) days after the end of the twelve-month period.

(D) Within sixty (60) days after the twelve-month period, each court in which the system is installed shall remit to the vendor or private contractor one-twelfth (1/12) of the amount as determined in this subdivision (c)(3) for the succeeding twelve (12) months.

History. Acts 2001, No. 1696, §§ 2, 3.

A.C.R.C. Notes. Acts 2001, No. 1696, § 1, provided: "(a) It is found by the General Assembly that the current system of case management, accounting, data collection, and data exchange in our state judicial system will be enhanced by the installation of a uniform computer system in the state's district courts. It is further determined that the current method of financing the state judicial system is not sufficient to provide this needed system. Finally, it is determined that performance-based budgeting is in the state's best interest.

"(b) It is, therefore, the intent of this section to implement a performance-based budgeting option for the state, counties, and cities to utilize for those courts which choose to acquire the uniform computer system selected by the Supreme Court Committee on Automation for the state's district courts."

CHAPTER 93

PROBATION AND PAROLE

SUBCHAPTER.

1. General Provisions.
2. Parole Board.
3. Probation — First Offenders.
4. Probation — Suspension of Sentence.
5. Alternative Service Act. [Repealed.]
6. Parole — Eligibility.
7. Parole — Grant or Revocation Generally.
8. Parole — Work-Release. [Repealed.]
9. Uniform Act for Out-of-State Parolee Supervision. [Repealed.]
10. Community Service Work — Acts 1989, No. 957.
11. Community Service Work — Acts 1989, No. 613.
12. Community Punishment.
13. Criteria for Transfer to Community Punishment Programs.
14. Notification of Offenders' Acquired Immune Deficiency Syndrome Status.
15. Parole — Sentence Served in County Jail.
16. Transitional Housing Facilities.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to §§ 16-93-207 — 16-93-210, 16-93-305 and 16-93-709 and subchapters 12-16 which were enacted subsequently.

RESEARCH REFERENCES

ALR. Immunity of public officer from liability for injuries caused by negligently released individual. 5 ALR 4th 773.

Conditioning probation on defendant's serving part of period in jail or prison. 6 ALR 4th 446.

Injuries caused by negligently released individual. 6 ALR 4th 1155.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody. 12 ALR 4th 722.

Propriety, as condition of probation, of requiring that probationer refrain from consumption of alcoholic beverages. 19 ALR 4th 1251.

Halfway house, rehabilitation center, or other restrictive environment as condition. 24 ALR 4th 789.

Conditioning probation on defendant's not entering specified geographical area. 28 ALR 4th 725.

Right of convicted defendant to refuse probation. 28 ALR 4th 736.

Probation officer's liability for negligent supervision of probationer. 44 ALR 4th 638.

Am. Jur. 59 Am. Jur. 2d, Pard., § 11 et seq.

Ark. L. Rev. Disposition of Offenders: Under Arkansas' New Criminal Code, 30 Ark. L. Rev. 222.

C.J.S. 67A C.J.S., Pard., § 42 et seq.

CASE NOTES

In General.

Chapter 93 is for the use of the Department of Correction in determining parole eligibility and the court has no authority to determine the manner in which the Board of Pardons and Parole exercises its prerogative. Jones v. State, 270 Ark. 328, 605 S.W.2d 7 (1980).

Subchapter 1 — General Provisions

SECTION.
16-93-101. Definitions.
16-93-102. Applicability of act to certain persons.
16-93-103. Authority of officers to make arrests and carry firearms.
16-93-104. Supervision fee — Direct payment by offender — Failure to pay.
16-93-105. [Repealed.]

Effective Dates. Acts 1968 (1st Ex. Sess.), No. 50, § 46: Mar. 1, 1968. Emergency clause provided: "The General Assembly finds that the penal system of the State of Arkansas is in need of immediate reform, in order better to effectuate the rehabilitation of persons convicted of crime and to make possible their return as useful members of the community, and that the immediate passage of this Act is necessary to establish a Department of Correction to effectuate such rehabilitation. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after March 1, 1968."

Acts 1983, No. 789, § 4: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that considerable savings in the cost of supervision of persons on parole/probation from the Department of Correction shall be made if employers of parolee/probationer inmates were authorized to withold and remit to the Department amounts required to be paid by parolee/probationers as the cost of supervision, on a monthly basis, instead of the Department being required to collect from each parolee/probationer the amount of such charge, and that the immediate passage of this Act is necessary in order to enable the Board of Correction and the State Board of Pardons and Paroles to promulgate

appropriate rules and regulations, and the necessary forms, to enable employers of parolees/probationers to withhold such cost to be remitted directly to the Department of Correction. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 887, § 4: Mar. 28, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that Sections 1 and 2 of Act 70 of 1981 need immediate amending. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health, safety, shall be in full force and effect after its passage and approval."

16-93-101. Definitions.

As used in this act:

(1) "Parole" means the release of the prisoner into the community by the Parole Board prior to the expiration of his or her term, subject to conditions imposed by the board and to the supervision of the Department of Community Correction. When a court or other authority has filed a warrant against the prisoner, the board may release him or her on parole to answer the warrant of the court or authority; and

(2) "Probation" means a procedure under which a defendant, found guilty upon verdict or plea, is released by the court without imprisonment, subject to conditions imposed by the court and subject to the supervision of the Department of Community Correction, but only if the supervision is requested in writing by the court.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 23; A.S.A. 1947, § 43-2801; Acts 2005, No. 1994, § 286.

Amendments. The 2005 amendment, in (1), substituted "Department of Community Correction" for "Board of Pardons and Paroles" and added "and" at the end; and, in (2), substituted "Parole Board" for "Board of Pardons and Paroles" and "the supervision of the Department of Community Correction" for "its supervision" and inserted "or her" twice.

Meaning of "this act". Acts 1968 (1st Ex. Sess.), No. 50, codified as §§ 12-27-101 — 12-27-105, 12-27-107 — 12-27-109, 12-27-112, 12-27-113, 12-27-115, 12-27-118, 12-27-120, 12-28-102, 12-29-101, 12-29-103, 12-29-104, 12-29-107, 12-29-112, 12-29-401, 12-30-301, 12-30-306, 12-30-401, 12-30-403, 12-30-405 — 12-30-407, 16-93-101, 16-93-102, 16-93-202 — 16-93-204, 16-93-601, 16-93-610, 16-93-701, 16-93-705.

16-93-102. Applicability of act to certain persons.

The provisions of this act are extended to any person who as of March 1, 1968, may be on parole or eligible to be placed on parole under existing laws, with the same force and effect as if this act had been in operation at the time the person was placed on parole or became eligible to be placed thereon, as the case may be.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 33; A.S.A. 1947, § 43-2812.

Meaning of "this act". See note to § 16-93-101.

16-93-103. Authority of officers to make arrests and carry firearms.

(a) Any probation officer appointed by a court, excluding a juvenile probation officer, whether circuit or district, and any parole and probation officer employed by the Department of Community Correction who is a currently certified law enforcement officer may execute, serve, and return all lawful warrants of arrest issued by the State of Arkansas or any political subdivision thereof and is otherwise authorized to make lawful arrests as is any law enforcement officer of the State of Arkansas.

(b) Any such parole and probation officer is further authorized to carry firearms during all hours in which he or she is actively pursuing the obligations and duties of the office to which he or she is appointed or employed, pursuant to selection and training requirements under §§ 12-9-104, 12-9-106, and 12-9-107.

(c) Any such parole and probation officer is further authorized to carry nonstate-issued firearms during all hours in which he or she is not actively pursuing the obligations and duties of the office to which he or she is appointed or employed.

History. Acts 1983, No. 617, § 1; A.S.A. 1947, § 43-2332.1; Acts 1997, No. 283, § 1; 1999, No. 1456, § 1; 2003, No. 1185, § 218; 2005, No. 1994, § 324.

Amendments. The 2003 amendment, in (c); substituted "district" for "municipal" and "Department of Community Correction" for "Department of Community Punishment."

The 2005 amendment substituted "employed" for "employed, pursuant to the restrictions in § 5-73-306" in (c).

16-93-104. Supervision fee — Direct payment by offender — Failure to pay.

(a)(1) Any offender on probation or parole under supervision of the Department of Community Correction shall pay to the department a fee as determined by the Board of Corrections.

(2) The Director of the Department of Community Correction or his or her designee shall deposit the payments received into the State Treasury as special revenues credited to the Community Correction Revolving Fund.

(3) Expenditures from the fund shall be used for continuation and expansion of community punishment programs as established and approved by the Board of Corrections.

(b)(1) When an offender on probation defaults in the payment of supervision fees or any installment thereof, the court may require the offender to show cause why he or she would not be imprisoned for nonpayment.

(2) The offender shall not be imprisoned if the offender is financially unable to make the payments and states so to the court in writing, under oath, and the court so finds.

(3) Unless the offender shows that his or her default was not attributable to a purposeful refusal to obey the sentence of the court or to a failure on his or her part to make a good faith effort to obtain the

funds required for payment, the court may order the defendant imprisoned until the payments are made.

(4) If the court determines that the default in payment is not attributable to the causes specified in subdivision (b)(3) of this section, the court may enter an order allowing the offender additional time for payment, reducing the amount of each installment, or revoking the fees or the unpaid portion thereof in whole or in part.

(c)(1) The offender on parole may be imprisoned for violation of parole if the offender is financially able to make the payments and if the payments are not made and the Parole Board so finds, subject to the limitations set out in this subsection.

(2) The offender shall not be imprisoned if the offender is financially unable to make the payments and states so under oath to the Parole Board in writing, and the Parole Board so finds.

History. Acts 1981, No. 70, §§ 1, 2; 1983, No. 887, §§ 1, 2; A.S.A. 1947, §§ 43-2808.1, 43-2808.2; Acts 1997, No. 278, § 1.

Cross References. As to conditions of suspended sentence or probation, see § 5-4-303.

16-93-105. [Repealed.]

Publisher's Notes. This section, concerning withholding of a supervision fee by employers, was repealed by Acts 1997, No. 278, § 2. The section was derived from Acts 1983, No. 789, §§ 1, 2; A.S.A. 1947, §§ 43-2808.3, 43-2808.4. For present law, see § 16-93-104.

Subchapter 2 — Parole Board

SECTION.
16-93-201. Creation — Members.
16-93-202. Seal — Records and reports.
16-93-203. Cooperation from prison officials.
16-93-204. Executive clemency.
16-93-205. Parole of Arkansas inmates in out-of-state prisons.
16-93-206. Board procedures.
16-93-207. Applications for pardon, commutation of sentence, and remission of fines and forfeitures.
16-93-208. Services and equipment.
16-93-209. Concealed handguns.
16-93-210. Annual report on parole applications and outcome.
16-93-211. Early release to transitional housing facilities.

Effective Dates. Acts 1968 (1st Ex. Sess.), No. 50, § 46: Mar. 1, 1968. Emergency clause provided: "The General Assembly finds that the penal system of the State of Arkansas is in need of immediate reform, in order better to effectuate the rehabilitation of persons convicted of crime and to make possible their return as useful members of the community, and that the immediate passage of this Act is necessary to establish a Department of Correction to effectuate such rehabilitation. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after March 1, 1968."

Acts 1969, No. 621, § 4: May 7, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present State Board of Pardons and Paroles consisting of three (3) members does not give proper representation on the Board to all sections of the State and that it is essential to the

proper administration of justice in the State that the three (3) member Board be abolished and a new five (5) member Parole Board be established immediately. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1980 (1st Ex. Sess.), No. 16, § 3: Jan. 25, 1980; Acts 1985, No. 925, § 2: Apr. 15, 1985. Emergency clauses provided: "It is hereby found and determined by the General Assembly that the per diem for the State Board of Pardons and Paroles is insufficiient to reimburse citizens for their cost of serving in this vital function and that an increase is necessary for the continued effective supervision and management of the Department and for the continued orderly operation of state government. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 700, § 3: Mar. 23, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that, in many instances, an application for parole filed with the State Board of Pardons and Paroles by Arkansas inmates confined in prison systems of other states, or of the federal government, may be acted upon by the Board without requiring the State of Arkansas to pay the cost of transporting the eligible candidate for parole back to the State of Arkansas for a personal interview before the Parole Board; and that the immediate passage of this Act is necessary to enable the Parole Board to act on applications for parole under such circumstances upon recommendation from the corresponding parole board or commission of such other state, or the federal government, thereby resulting in savings of funds vitally needed by the Arkansas Department of Correction for other essential services for inmates. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 5, § 8: Jan. 29, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the people of Arkansas are not receiving adequate notice of the granting of applications for pardon, commutation of sentence, or remission of fine or forfeiture; that applications for pardon, commutation of sentence, or remission of fine or forfeiture are not being acted upon within a reasonable period of time after receipt of the recommendation of the State Board of Parole and Community Rehabilitation; and that repeated applications by the same individuals for pardon, commutation of sentence, or remission of fine or forfeiture are delaying the processing of applications for pardon, commutation of sentence, or remission of fine or forfeiture. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Identical Acts 1994 (1st Ex. Sess.), Nos. 8 and 9, § 7: Mar. 4, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that the correctional policies of the State of Arkansas are in need of immediate reform in order to better provide for a balanced correctional system and to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community and passage of this act is necessary to facilitate these reforms. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 195, § 9: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1995 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1995 could work irreparable harm upon the proper administration and provision

of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1995, No. 285, § 5: Feb. 13, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Post Prison Transfer Board is presently composed of four part-time members and three full-time members; that the workload of the Board dictates that more full-time members are necessary; that this bill increases the number of full-time members to five; and that the change in the composition of the Board should occur as soon as possible in order for it to properly carry out its duties. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 381, § 5: Feb. 20, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the effective and efficient operation of the Post Prison Transfer Board that the full time membership of the board be increased from three to five and the part time membership be reduced to two; that this act is designed to make such urgent and necessary revision in the membership of the board and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governer [sic], it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 979, § 6: Mar. 31, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the Post Prison Transfer Board is now composed of five (5) full-time members and two (2) part-time members; that the work of the board demands the attention of six (6) full-time members; that this act would result in the Post Prison Transfer Board being composed of six (6) full-time members and one (1) part-time member; that the conversion of the one (1) part-time member to full-time member should occur as soon as possible; and that unless this emergency clause is adopted this act will not go into effect until ninety (90) days after adjournment of this regular session. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1031, § 7: Apr. 2, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the 'Task Force to Study the Disparity in Sentencing for Persons Convicted of Non-violent Crimes' has found that it appears that some Arkansas citizens do not receive equitable sentences under the law; that it is necessary to compile statistical sentencing information in order to determine if disparities exist; and that this act is immediately necessary to allow the compiling of the needed statistical information in the first quarter of 2003. Therefore, an emergency is declared to exist and this act

being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

16-93-201. Creation — Members.

(a)(1) There is created the Parole Board, to be composed of seven (7) members to be appointed from the state at large by the Governor and confirmed by the Senate.

(2) Six (6) members shall be full-time officials of this state, one (1) of whom shall be designated by the Governor as the chair of the board.

(3) Members shall serve seven-year terms, except that the terms shall be staggered by the Governor so that the term of one (1) member expires each year.

(b) If any vacancy occurs on the board prior to the expiration of a term, the Governor shall fill the vacancy for the remainder of the unexpired term, subject to confirmation by the Senate at its next regular session.

(c) The members of the board may receive expense reimbursement and stipends in accordance with § 25-16-901 et seq.

(d) Four (4) members of the board shall constitute a quorum.

History. Acts 1989, No. 937, §§ 2, 3, 5; 1993, No. 530, § 1; 1993, No. 547, § 1; 1995, No. 285, § 1; 1995, No. 381, § 1; 1997, No. 250, § 120; 1999, No. 979, § 1; 2005, No. 1033, § 1.

A.C.R.C. Notes. As amended by Acts 1995, Nos. 285 and 381, subsection (a) contained an additional subdivision which read as follows: "(A) The terms of office of two (2) of the four (4) part-time members serving on January 1, 1995, shall expire on February 13, 1995.

"(B) The Governor shall designate the two (2) members whose terms shall expire and shall appoint two (2) full-time members to replace them."

Publisher's Notes. Acts 1968 (1st Ex. Sess.), No. 50, § 37, provided that all functions, powers, and duties with respect to pardons, paroles, and probation previously performed by the State Penitentiary Board, acting as the State Board of Pardons, Paroles, and Probation, would be transferred from that board to the Board of Pardons and Paroles; it further provided that all books, records, supplies, materials, furniture, furnishings, and other properties belonging to the State Office of Pardons, Paroles, and Probation would be retained in that office and would be the property, and under the custody, of the Department of Correction; finally, it provided that the appropriation of funds made for the Office of Pardons and Paroles by Acts 1967, No. 391, would be for the Department of Correction, to the extent of the unexpended and unencumbered balances therein as of March 1, 1968.

Acts 1969, No. 621, § 1, provided that the State Board of Pardons and Paroles created by Acts 1968 (1st Ex. Sess.), No. 50 would be abolished and that all powers, functions, and duties of the board would be transferred to, and vested in, the State Board of Pardons and Paroles created by the 1969 act.

Former § 16-93-201, concerning the members — powers and duties, was repealed by Acts 1989, No. 937, § 8. The former section was derived from Acts 1968 (1st Ex. Sess.), No. 50, §§ 25, 35, 36; 1969, No. 621, § 2; 1980 (1st Ex. Sess.), No. 16, § 1; 1985, No. 925, § 1; A.S.A. 1947, §§ 43-2802.1, 43-2804, 43-2814, 43-2815.

Acts 1989, No. 937, § 1, provided: "The State Board of Pardons and Paroles created by Act 621 of 1969, as amended, and the Commission on Community-Based Re-

habilitation created by Act 378 of 1975, as amended, are hereby abolished and all powers, functions and duties of said Board and Commission are hereby transferred under a Type 2 transfer as set forth in Arkansas Code 25-2-105 to and vested in the State Board of Parole and Community Rehabilitation herein created."

Acts 1989, No. 937, § 2, provided, in part, that the Governor shall designate the terms of the initial members in such manner that the term of one member shall expire on January 14 of each year beginning January 14, 1990, and that the initial term of the chairman shall begin on July 3, 1989, and expire on January 14, 1996, with successors appointed for terms of seven years. The operation of subsection (c) may be affected by the enactment of Acts 1995, No. 1211, codified as § 25-16-901 et seq.

Acts 1995, No. 285, § 5, provided: "It is hereby found and determined by the General Assembly that the Post Prison Transfer Board is presently composed of four part time members and three full time members; that the workload of the Board dictates that more full time members are necessary; that this bill increases the number of full time members to five; and that the change in the composition of the Board should occur as soon as possible in order for it to properly carry out its duties. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 381, § 5, provided: "It is hereby found and determined by the General Assembly that it is essential to the effective and efficient operation of the Post Prison Transfer Board that the full time membership of the Board be increased from three to five and the part time membership be reduced to two; that this act is designed to make such urgent and necessary revision in the membership of the Board and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 979, § 2 provided: "The Governor shall designate which of the two current part-time members of Post Prison Transfer Board is converted to a full-time member by this act."

Amendments. The 2005 amendment substituted "Parole Board" for "Post Prison Transfer Board" in (a)(1), (b) and (d).

16-93-202. Seal — Records and reports.

(a) The Parole Board shall adopt an official seal of which the courts shall take judicial notice.

(b) The board shall keep a record of its acts and shall notify each institution and facility of its decisions relating to persons who have been confined therein.

(c)(1) An annual report in writing shall be made by the board on or before February 1 of each year for the preceding year.

(2) The report shall be directed to the Governor and to the General Assembly and shall contain statistical and other data concerning its work, including research studies which it may make on parole or related functions.

(d)(1) A presentence report, a preparole report, and a supervision history obtained in the discharge of official duty by any member or employee of the board shall be privileged and shall not be disclosed, directly or indirectly, to any person other than the board, a court, or others entitled under this chapter to receive the information.

(2) However, the board or a court, at its discretion, may permit the inspection of the report or parts thereof by a person having a proper

interest therein whenever the interests or welfare of the person involved makes that action desirable or helpful.

History. Acts 1968 (1st Ex. Sess.), No. 50, §§ 26, 27; A.S.A. 1947, §§ 43-2805, 43-2806; Acts 1993, No. 530, § 3; 1993, No. 547, § 3.

16-93-203. Cooperation from prison officials.

It shall be the duty of any correctional official to:

(1) Grant access at all reasonable times to any prisoner over whom the board has jurisdiction under this chapter to the members of the Parole Board or its properly accredited representatives;

(2) Provide the board and its representatives facilities for communicating with and observing the person; and

(3) Furnish the board with:

(A) The reports the board requires concerning the conduct and character of any prisoner in his or her custody; and

(B) Any facts the board deems pertinent in determining whether:

(i) The prisoner shall be transferred and under what conditions the prisoner shall be transferred; or

(ii) The prisoner shall be paroled.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 30; A.S.A. 1947, § 43-2809; Acts 1993, No. 530, § 4; 1993, No. 547, § 4.

16-93-204. Executive clemency.

(a)(1)(A) All applications for pardon, commutation of sentence, reprieve, respite, or remission of fine or forfeiture shall be signed by the applicant under oath.

(B) For purposes of § 5-53-102, the application shall be deemed an official proceeding.

(2) An applicant shall obtain and include with his or her application a certified copy of the applicant's judgment and commitment order or comparable document.

(3) Applications shall be referred to the Parole Board for investigation.

(b) The board shall thereupon investigate each case and shall submit to the Governor its recommendation, a report of the investigation, and all other information the board may have regarding the applicant.

(c)(1) As part of the board's investigation, the chair of the board or his or her designee shall have the power to issue oaths and subpoena witnesses to appear and testify and to bring before the board any relevant books, papers, records, or documents.

(2)(A) The subpoena shall be directed to any sheriff, coroner, or constable of the county in which the designated witness resides or is found.

(B) The endorsed affidavit on the subpoena of any person shall be proof of the service of the subpoena.

(C) The subpoena shall be served and returned in the same manner as subpoenas in civil actions in the circuit courts are served and returned.

(d)(1) Before the board shall consider an application for a pardon or recommend a commutation of sentence, the board shall solicit the written or oral recommendation of the committing court, the prosecuting attorney, and the sheriff of the county from which the person was committed.

(2)(A) Before considering an application for a pardon or recommending a commutation of sentence of a person who was convicted of capital murder, § 5-10-101, or a Class Y, Class A, or Class B felony, the board shall notify the victim of the crime or the victim's next of kin, if he or she files a request for notice with the prosecuting attorney.

(B) When the board provides notice under subdivision (d)(2)(A) of this section, the board shall solicit the written or oral recommendations of the victim or the victim's next of kin regarding the granting of a pardon or commutation of sentence.

(3) The board shall retain a copy of the recommendations in the board's file.

(4) The recommendations shall not be binding upon the board in advising the Governor whether to grant a pardon or commute a sentence but shall be maintained in the inmate's file.

(5)(A) If a hearing will be held on the application, the board shall notify the victim or the victim's next of kin of the date, time, and place of the hearing.

(B) The notice shall be given when soliciting the recommendations of the victim of the crime or the victim's next of kin.

(e) At least thirty (30) days before submitting to the Governor a recommendation that an application for pardon, commutation of sentence, or remission of fine or forfeiture be granted, the board shall:

(1) Issue a public notice of its intention to make such a recommendation; and

(2) Send notice of its intention to the circuit judge who presided over the applicant's trial, the prosecuting attorney, and the sheriff of the county in which the applicant was convicted and, if applicable, to the victim or the victim's next of kin if the victim or the victim's next of kin registered for notification with the prosecuting attorney under § 16-21-106(c).

(f) Whether the board recommends that an application for pardon, commutation of sentence, or remission of fine or forfeiture be granted or denied by the Governor, the board shall issue public notice of each recommendation.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 32; A.S.A. 1947, § 43-2811; Acts 1991, No. 706, § 2; 1993, No. 530, § 5; 1993, No. 547, § 5; 2005, No. 1975, § 3.

Amendments. The 2005 amendment redesignated former (a) as present (a)(1)(A) and (a)(3); added (a)(1)(B) and (a)(2); inserted "shall be signed by the applicant under oath" in present (a)(1)(A); inserted "Applications" in (a)(3); substi-

tuted "board" for "Post Prison Transfer Board" in (b); added present (c); redesignated former (c) as present (d); added (e) and (f); and made gender neutral changes.

Cross References. Manner of applying for executive clemency, § 5-4-607.

Victim notification system, § 12-12-1201 et seq.

CASE NOTES

Analysis

In general.
Authority of board.
Authority of governor.
Factors considered.
Investigation.

In General.

While this section does require the board to solicit the nonbinding recommendations of the committing court, the prosecuting attorney, the sheriff in whose county trial was had, and the victim or the victim's next of kin, it imposes no standards, criteria, or factors which the board may or may not consider in making its recommendation; when a commutation statute does not impose standards constraining the discretion of the board as to when clemency must be granted, the statute does not create a constitutional right or entitlement sufficient to invoke the Due Process Clause. Whitmore v. Gaines, 24 F.3d 1032 (8th Cir. 1994).

Authority of Board.

The board's recommendation is not binding on the governor and nothing in the Arkansas Code restricts the discretion of either the board or the governor. Whitmore v. Gaines, 24 F.3d 1032 (8th Cir. 1994).

The Post Prison Transfer Board has no authority to grant clemency; its duty is to investigate an application for clemency and submit to the governor its recommendation regarding the application. Whitmore v. Gaines, 24 F.3d 1032 (8th Cir. 1994).

Because this section does not impose standards constraining the discretion of the board as to when clemency must be granted, the statute does not create a constitutional right or entitlement sufficient to invoke the Due Process Clause. Perry v. Brownlee, 122 F.3d 20 (8th Cir. 1997).

Authority of Governor.

The Governor has absolute discretion in granting or denying executive clemency; however, the decision must be made after mandated statutory procedures have been completed. Perry v. Brownlee, 972 F. Supp. 480 (E.D. Ark. 1997).

Factors Considered.

This section imposes no standards on what the board or the Governor may consider in making their decisions, and the Governor is not bound by the board's recommendation. Perry v. Morgan, 122 F.3d 18 (8th Cir. 1997); Perry v. Brownlee, 122 F.3d 20 (8th Cir. 1997).

Investigation.

Absent any statutory standards governing what criteria the board may consider, any question asked by a single board member in an effort to explore or draw out asserted reasons for clemency or to reach a decision concerning the application would be appropriate. Whitmore v. Gaines, 24 F.3d 1032 (8th Cir. 1994).

The fact that the prisoner seeking clemency acknowledges the legality of his sentence is a factor to which a clemency board may give such weight as it chooses. Whitmore v. Gaines, 24 F.3d 1032 (8th Cir. 1994).

Cited: Young v. State, 252 Ark. 184, 477 S.W.2d 823 (1972); Richley v. Gaines, 860 F. Supp. 636 (E.D. Ark. 1994).

16-93-205. Parole of Arkansas inmates in out-of-state prisons.

(a) The Parole Board may request the appropriate board or commission having jurisdiction over parole or transfer matters in other states or the United States Parole Commission to make recommendations concerning whether Arkansas inmates confined in prison systems of the other states or in federal prisons should be granted parole or transfer when eligible under Arkansas law.

(b) The board may take action at its option on the application of an inmate for parole, using as its criteria the recommendations received from the appropriate board or commission of the other states or the United States Parole Commission in lieu of the personal appearance before the board of the inmate seeking parole or transfer.

History. Acts 1983, No. 700, § 1; A.S.A. 1947, § 43-2809.1; Acts 1993, No. 530, § 6; 1993, No. 547, § 6.

16-93-206. Board procedures.

(a)(1) For those persons eligible for parole, the Parole Board shall retain the power to determine which persons shall be placed on parole and to fix the time and conditions of the parole.

(2) The Parole Board shall conduct open meetings and shall make public its findings for each eligible candidate for parole.

(3) Inmate interviews may be closed to the public.

(4) The Parole Board retains the right to formulate all policies, rules, and regulations regarding parole, including amendments to those previously formulated by the State Board of Parole and Community Rehabilitation.

(b)(1)(A) For persons who on or after January 1, 1994, commit felonies under the provisions of a transfer date, except those enumerated in subdivision (c)(1) of this section, the Department of Correction will transfer inmates to the Department of Community Correction subject to rules and regulations promulgated by the Board of Corrections and conditions set by the Parole Board.

(B) The conditions under which transfer shall occur include, but are not limited to:

(i) Level of supervision;

(ii) Economic fee sanction;

(iii) Treatment program; and

(iv) Other conditions relevant to the individual under review.

(C) This review may be conducted without a hearing when:

(i) The inmate has not received a major disciplinary report against him or her that resulted in the loss of good time;

(ii) There has not been a request by a victim to have input on transfer conditions; and

(iii) There is no indication in the risk needs assessment review that special conditions need to be placed on the inmate.

(2)(A) When one (1) or more of the circumstances in subdivision (b)(1) of this section are present, the Parole Board shall conduct a hearing to determine the appropriateness of the inmate for transfer.

(B) The Parole Board has two (2) options:

(i) To transfer the individual to the Department of Community Correction accompanied by conditions of the transfer, including, but not limited to, supervision levels, programming requirements, and facility placement when appropriate; or

(ii)(*a*) To deny the transfer based on a set of established criteria and to accompany the denial with a course of action to be undertaken by the inmate to rectify the board's concerns.

(*b*) Upon completion of the course of action determined by the Parole Board, after final review of the inmate's file to ensure successful completion, the Parole Board shall authorize the inmate's transfer to the Department of Community Correction in accordance with administrative policies and procedures governing a transfer and subject to conditions attached to the transfer.

(3) Should an inmate fail to fulfill the course of action outlined by the Parole Board to facilitate transfer to the Department of Community Correction, it shall be the responsibility of the inmate to petition the Parole Board for rehearing.

(4)(A) The course of action required by the Parole Board shall not be outside the current resources of the Department of Correction, nor shall conditions set be outside the current resources of the Department of Community Correction.

(B) However, the Department of Correction and the Department of Community Correction shall strive to accommodate the actions required by the Parole Board to the best of their ability.

(c)(1) A person who commits the following felonies on or after January 1, 1994, shall be eligible to be considered for discretionary transfer to the Department of Community Correction by the Parole Board after having served one-third (⅓) or one-half (½) of his or her sentence, with credit for meritorious good time, depending on the seriousness determination made by the Arkansas Sentencing Commission, or one-half (½) of the time to which his or her sentence is commuted by executive clemency, with credit for meritorious good time:

(A) Any homicide, §§ 5-10-101 — 5-10-105;

(B) Sexual assault in the second degree, § 5-14-125;

(C) Battery in the first degree, § 5-13-201;

(D) Domestic battering in the first degree, § 5-26-303;

(E) The following Class Y felonies:

(i) Kidnapping, § 5-11-102;

(ii) Rape, § 5-14-103;

(iii) Aggravated robbery, § 5-12-103;

(iv) Causing a catastrophe, § 5-38-202(a);

(F) Engaging in a continuing criminal enterprise, § 5-64-405; or

(G) Simultaneous possession of drugs and firearms, § 5-74-106.

(2)(A) The transfer of an offender convicted of an above-listed offense is not automatic.

(B) The Parole Board will have the authority to transfer such an inmate at a time when, based on a combination of its opinion and appropriate assessment by a risk needs assessment tool, there is reasonable probability that the inmate can be released without detriment to the community or the inmate.

(3) Notification of the court, prosecutor, sheriff, and the victim or the victim's next of kin shall follow the procedures set forth below:

(A)(i) Before the Parole Board shall grant any transfer, the Parole Board shall solicit the written or oral recommendations of the committing court, the prosecuting attorney, and the sheriff of the county from which the inmate was committed.

(ii) If the person whose transfer is being considered by the Parole Board was convicted of one (1) of the Class Y felonies enumerated in subdivision (c)(1) of this section, the Parole Board shall also notify the victim of the crime or the victim's next of kin of the transfer hearing and shall solicit written or oral recommendations of the victim or his or her next of kin regarding the granting of the transfer unless the prosecuting attorney has notified the Parole Board at the time of commitment of the prisoner that the victim or his or her next of kin does not want to be notified of future transfer hearings.

(iii) The recommendations shall not be binding upon the Parole Board in the granting of any transfer but shall be maintained in the inmate's file.

(iv) When soliciting recommendations from a victim of a crime, the Parole Board shall notify the victim or his or her next of kin of the date, time, and place of the transfer hearing;

(B)(i) The Parole Board shall not schedule transfer hearings at which victims or relatives of victims of crimes are invited to appear at a facility wherein inmates are housed other than the central administration building of the Department of Correction at Pine Bluff.

(ii) Nothing herein shall be construed as prohibiting the Parole Board from conducting transfer hearings in two (2) sessions, one (1) at the place of the inmate's incarceration for interviews with the inmate, the inmate's witnesses, and correctional personnel, and the second session for victims and relatives of victims as set out in subdivision (c)(3)(B)(i) of this section;

(C)(i) At the time that any person eligible under subdivision (c)(1) of this section is transferred by the Parole Board, the Department of Community Correction shall give written notice of the granting of the transfer to the sheriff, the committing court, and the chief of police of each city of the first class of the county from which the person was sentenced.

(ii) If the person is transferred to a county other than that from which he or she was committed, the Parole Board shall give notice to the chief of police or marshal of the city to which he or she is transferred, to the chief of police of each city of the first class and the sheriff of the county to which he or she is transferred, and to the sheriff of the county from which the person was committed; and

(D)(i) It shall be the responsibility of the prosecuting attorney of the county from which the inmate was committed to notify the Parole Board at the time of commitment of the desire of the victim or his or her next of kin to be notified of any future transfer hearings and to forward to the Parole Board the last known address and telephone number of the victim or his or her next of kin.

(ii) It shall be the responsibility of the victim or his or her next of kin to notify the Parole Board of any change in address or telephone number.

(iii) It shall be the responsibility of the victim or his or her next of kin to notify the Parole Board after the date of commitment of any change in regard to the desire to be notified of any future transfer hearings.

(d)(1) In all other felonies, before the Parole Board sets conditions for transfer of an inmate to community punishment, a victim or his or her next of kin in cases in which the victim is unable to express his or her wishes, who have expressed the wish to be consulted by the Parole Board shall be notified of the date, time, and place of the transfer hearing.

(2)(A) A victim or his or her next of kin who wishes to be consulted by the Parole Board shall inform the Parole Board in writing at the time of sentencing.

(B) A victim or his or her next of kin who does not so inform the Parole Board shall not be notified by the Parole Board.

(3)(A) Victim input to the Parole Board shall be limited to oral or written recommendations on conditions relevant to the offender under review for transfer.

(B) The recommendations shall not be binding on the Parole Board, but shall be given due consideration within the resources available for transfer.

(e)(1) The Parole Board shall approve a set of conditions that shall be applicable to all inmates transferred from the Department of Correction to the Department of Community Correction.

(2) The set of conditions is subject to periodic review and revision as the Parole Board deems necessary.

(f) The Parole Board shall set such conditions as necessary within the range of correctional resources available at the time of transfer.

(g)(1) The Parole Board shall serve as the revocation review board for any person subject to either parole or transfer from prison.

(2) Revocation proceedings for either parole or transfer shall follow all legal requirements applicable to parole and shall be subject to any additional policies, rules, and regulations set by the Parole Board.

(h) Decisions on parole release, courses of action applicable prior to transfer, and transfer conditions to be set by the Parole Board shall be based on a reasoned and rational plan developed in conjunction with an accepted risk needs assessment tool such that each decision is defensible based on preestablished criteria.

History. Acts 1993, No. 530, § 2; 1993, No. 547, § 2; 1994 (1st Ex. Sess.), No. 8, § 1; 1994 (1st Ex. Sess.), No. 9, § 1; 1999, No. 1035, § 1; 2003, No. 1390, § 9.

A.C.R.C. Notes. Identical Acts 1994 (1st Ex. Sess.), Nos. 8 and 9, § 3, provided: "The inmate transfer provisions in Arkansas Code Annotated § 16-93-206(b)(1)(A)(ii) and § 16-93-1301(b)(2) shall expire on April 1, 1995."

Acts 1995, No. 577, § 2, provided: "The inmate transfer provisions in Arkansas Code Annotated 16-93-206(b)(1)(A)(ii) and 16-93-1301(b)(2) shall expire on April 1,

1997." The reference to 16-93-1301(b)(2) is interpreted to be a reference to current 16-93-1301(b)(4), which was redesignated by the 1994 (2nd Ex. Sess.) amendment.

Amendments. The 2003 amendment rewrote (c)(1)(B).

Cross References. Victim notification system, § 12-12-1201 et seq.

16-93-207. Applications for pardon, commutation of sentence, and remission of fines and forfeitures.

(a)(1)(A) At least thirty (30) days before granting an application for pardon, commutation of sentence, or remission of fine or forfeiture, the Governor shall file with the Secretary of State a notice of his or her intention to grant the application.

(B)(i) The Governor shall also direct the Department of Correction to send notice of his or her intention to the judge, the prosecuting attorney, and the sheriff of the county in which the applicant was convicted and, if applicable, to the victim or the victim's next of kin.

(ii) The notification to the victim or the victim's next of kin shall not be required if the conviction occurred more than ten (10) years prior to the filing of the notice under subdivision (a)(1)(A) of this section.

(2) The filing of the notice shall not preclude the Governor from later denying the application, but any pardon, commutation of sentence, or remission of fine or forfeiture granted without filing the notice shall be null and void.

(b) If the Governor does not grant an application for pardon, commutation of sentence, or remission of fine or forfeiture within two hundred forty (240) days of the Governor's receipt of the recommendation of the Parole Board regarding the application, the application shall be deemed denied by the Governor, and any pardon, commutation of sentence, or remission of fine or forfeiture granted after the two-hundred-forty-day period shall be null and void.

(c)(1)(A) Except as provided in subdivision (c)(3) of this section, if an application for pardon, commutation of sentence, or remission of fine or forfeiture is denied in writing by the Governor, the person filing the application shall not be eligible to file a new application for pardon, commutation of sentence, or remission of fine or forfeiture related to the same offense for a period of four (4) years from the date of filing the application that was denied.

(B) Any person who made an application for pardon, commutation of sentence, or remission of fine or forfeiture that was denied on or after July 1, 2004, shall be eligible to file a new application four (4) years after the date of filing the application that was denied.

(2) If an application for pardon, commutation of sentence, or remission of fine or forfeiture is denied by the Governor pursuant to subsection (b) of this section, the person filing the application may immediately file a new application for pardon, commutation of sentence, or remission of fine or forfeiture related to the same offense.

(3)(A) The Parole Board may waive the waiting period for filing a new application for pardon, commutation of sentence, or remission of fine or forfeiture described in subdivision (c)(1)(A) of this section if:

(i) It has been at least twelve (12) months after the date of filing the application that was denied; and

(ii) The Parole Board determines that the person whose application was denied has established that:

(*a*) New material evidence relating to the person's guilt or punishment has been discovered;

(*b*) The person's physical or mental health has substantially deteriorated; or

(*c*) Other meritorious circumstances justify a waiver of the waiting period.

(B)(i) The Board of Corrections shall promulgate rules that will establish policies and procedures for waiver of the waiting period.

(ii) The Board of Corrections may make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(d) If an application for pardon, commutation of sentence, or remission of fine is granted, the Governor shall:

(1) Include in his or her written order the reasons for granting the application; and

(2) File with the Senate and the House of Representatives a copy of the order that includes:

(A) The applicant's name;

(B) The offense of which the applicant was convicted;

(C) The sentence imposed upon the applicant;

(D) The date that the sentence was imposed; and

(E) The effective date of the pardon, commutation of sentence, or remission of fine.

(e)(1) This section shall not apply to reprieves.

(2) Reprieves may be granted as presently provided by law.

History. Acts 1993, No. 5, §§ 1-4; 1995, No. 1195, § 1; 1999, No. 498, § 2; 2005, No. 1975, §§ 4, 5; 2005, No. 2097, § 2.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this section which was enacted subsequently.

Amendments. The 2005 amendment by No. 1975, in (b), substituted "two hundred forty (240)" for "one hundred twenty (120)" and "two-hundred-forty-day" for "one-hundred-twenty-day"; inserted present (d); and redesignated former (d) as present (e).

The 2005 amendment by No. 2097 redesignated former (c)(1) as present (c)(1)(A); in (c)(1)(A), added "Except as provided in subdivision (c)(3) of this section" and substituted "filing the application that was denied" for "the denial"; added (c)(1)(B) and (c)(3); and made related changes.

16-93-208. Services and equipment.

The Department of Correction and the Department of Community Correction may provide services, furnishings, equipment, and office space to assist the Parole Board in fulfilling the purposes for which the board was created by law.

History. Acts 1995, No. 195, § 3.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this section which was enacted subsequently.

Acts 2001, No. 18, § 3, provided: "ASSISTANCE PROVISION. The Department of Correction and the Department of Community Punishment may provide services, furnishings, equipment and office space to assist the Post Prison Transfer Board in fulfilling the purposes for which the Board was created by law."

Acts 2003, No. 456, § 3, provided: "ASSISTANCE PROVISION. The Department of Correction and the Department of Community Correction may provide services, furnishings, equipment and office space to assist the Post Prison Transfer Board in fulfilling the purposes for which the Board was created by law. The provisions of this section shall be in effect only from July 1, 2003 through June 30, 2005."

Acts 2005, No. 2269, § 3, provided: "ASSISTANCE PROVISION. The Department of Correction and the Department of Community Correction may provide services, furnishings, equipment and office space to assist the Post Prison Transfer Board in fulfilling the purposes for which the Board was created by law.

"The provisions of this section shall be in effect only from July 1, 2005 through June 30, 2007."

Publisher's Notes. Acts 1995, No. 195, § 3, is also codified as § 12-27-136.

16-93-209. Concealed handguns.

Members of the Parole Board and board investigators who have been issued a concealed handgun permit by the Department of Arkansas State Police pursuant to § 5-73-301 et seq., are authorized to carry their concealed handguns in any building in or location on which law enforcement officers are authorized to carry handguns, provided that the board members and investigators are on official business of the board.

History. Acts 1999, No. 1253, § 1.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this section which was enacted subsequently.

16-93-210. Annual report on parole applications and outcome.

(a)(1) Beginning July 31, 2003, and on July 31 of each year thereafter, the Parole Board shall submit an annual report to the Legislative Council and the Commission on Disparity in Sentencing showing the number of persons who make application for parole and those who are granted or denied parole during the fiscal year for each criminal offense classification.

(2) The report shall include a breakdown by race of all persons sentenced in each criminal offense classification.

(b) The board shall cooperate with and upon request make presentations and provide various reports, to the extent the board's budget will allow, to the Legislative Council concerning board policy and criteria on discretionary offender programs and services.

History. Acts 2003, No. 1031, § 6; 2005, No. 1994, § 277.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this section which was enacted subsequently.

Acts 2003, No. 1031, § 1, provided: "Intent.

"(a) Ethnic minorities appear to be over represented in the population of persons who are involved in the criminal justice system, charged as defendants, convicted,

and incarcerated throughout the United States criminal justice systems.

"(b) It is the responsibility of criminal justice agencies and the courts in the State of Arkansas to ensure that all actions taken are based upon reasons other than the race of the defendant.

"(c) In order to allow the General Assembly to conduct a thorough review of the Arkansas criminal justice process, information on actions taken by criminal justice agencies and the courts must be reported in a timely, uniform, and consistent manner."

The Commission on Disparity in Sentencing, referred to in (a), was to be created by HB 2264 of the 2003 session which did not pass.

Amendments. The 2005 amendment deleted "and the Commission on Disparity in Sentencing" following "Legislative Council" in (b).

16-93-211. Early release to transitional housing facilities.

(a)(1) As used in this section, "transitional housing" means a program that provides housing for one (1) or more offenders who have been either:

(A) Transferred or paroled from the Department of Correction by the Parole Board; or

(B) Placed on probation by a circuit court or district court.

(2) An offender's home or the residence of an offender's family member shall not be considered a transitional housing facility for purposes of this section.

(b)(1) To assist an offender who will be eligible for parole or transfer to successfully reintegrate into the community, the board is authorized to place the offender into approved transitional housing up to one (1) year prior to the offender's date of eligibility for parole or transfer.

(2) Subject to conditions of release and consistent with rules promulgated by the board, placement in a transitional housing facility must be preceded by:

(A) The provision of all applicable notices under § 16-93-206; and

(B) A hearing conducted by the board.

(c) The decision to place an offender in transitional housing and the establishment of conditions of release by the board must be based on a reasoned, rational plan developed in conjunction with an accepted risk-needs assessment tool such that each placement decision is based on;

(1) Established criteria; and

(2) A determination that there is a reasonable probability that an offender can be placed in a transitional housing facility without detriment to:

(A) The community; or

(B) The offender.

(d) Conditions of release imposed by the board must at a minimum include a curfew requiring an offender placed in transitional housing to present himself or herself at a scheduled time to be confined in the transitional housing facility.

(e) An offender placed in transitional housing by the board will be supervised by officers of the Department of Community Correction.

(f) An offender who without permission leaves the custody of the transitional housing facility in which he or she is placed may be subject to criminal prosecution for escape, §§ 5-54-110 — 5-54-112.

(g) Revocation of placement in transitional housing must follow the revocation proceedings established in § 16-93-705.

History. Acts 2005, No. 679, § 1.

Subchapter 3 — Probation — First Offenders

SECTION.
16-93-301. Definition.
16-93-302. Penalties.
16-93-303. Procedure.
16-93-304. Arkansas Crime Information Center.
16-93-305. Sex offender may not reside with minor victim.

Cross References. Expungement of record, § 16-90-601 et seq.

Preambles. Acts 1975, No. 346, contained a preamble which read: "Whereas, under present state law the circuit and municipal judges of this State are clothed with very little discretion and have limited alternatives in the disposition of cases involving first offenders; and

"Whereas, circuit and municipal judges throughout the state feel that existing law governing the disposition of cases involving first offenders is unduly harsh and restrictive; and

"Whereas, respected leaders in the field of judicial reform feel that the administration of justice, the preservation of law and order, and increased respect for the judicial system could best be served by providing diversionary procedures for the disposition of cases involving first offenders;

"Now, therefore...."

Effective Dates. Acts 1975, No. 346, § 8: Mar. 10, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that present law applicable to the disposition of cases involving first offenders is unduly harsh and restrictive, and that the administration of justice, the preservation of law and order, and increased respect for the judicial system could best be served by providing diversionary procedures for the disposition of cases involving youthful offenders. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 581, § 3: Mar. 18, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 346 of 1975 was designed as a first offender probation law; that there is currently no method of determining whether an individual has received probation under the terms of such Act more than one time; that in order to limit Act 346 of 1975 to being used no more than one time by the same person, it is necessary to initiate statewide reporting by the sentencing courts; that the Arkansas Crime Information Center is best equipped to maintain such statewide records; and that this Act is immediately necessary to accomplish these purposes. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 1188, § 6: Apr. 8, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the physical and psychological health of our children is one of our most compelling interests. Furthermore, taking responsible measures to protect our children from persons who have sexually victimized them will significantly decrease the possibility of recur-

rences. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-93-301. Definition.

As used in §§ 16-93-301 — 16-93-303 the procedure, effect, and definition of "expungement" shall be in accordance with that established in § 16-90-901 et seq.

History. Acts 1975, No. 346, § 1; A.S.A. 1947, § 43-1231; Acts 1995, No. 998, § 8.

CASE NOTES

In General.

Police captain's obedience of the subpoena to furnish plaintiff's criminal record was legally reasonable where it clearly would have been a violation of law for him to refuse to honor the subpoena, and it was equally clear that judicial officials were entitled to examine the expunged records. Morton v. City of Little Rock, 934 F.2d 180 (8th Cir. 1991).

Cited: Morton v. City of Little Rock, 728 F. Supp. 543 (E.D. Ark. 1989); Doe v. Ark. Dep't of Human Servs., — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 328 (May 20, 2004).

16-93-302. Penalties.

(a)(1) No person may avail himself or herself of the provisions of this section and §§ 16-93-301 and 16-93-303 on more than one (1) occasion.

(2) Any person seeking to avail himself or herself of the benefits of this section and §§ 16-93-301 and 16-93-303 who falsely testifies, swears, or affirms to the court that he or she has not previously availed himself or herself of the benefits of this section and §§ 16-93-301 and 16-93-303 is guilty of a Class D felony.

(b)(1) Any person charged under the provisions of this section and §§ 16-93-301 and 16-93-303 with keeping the confidential records of first offenders, as provided in § 16-93-301, who divulges any information contained in the records to any person or agency other than a law enforcement officer or judicial officer is guilty of a violation and upon conviction is subject to a fine of not more than five hundred dollars ($500).

(2) Each violation shall be considered a separate offense.

History. Acts 1975, No. 346, §§ 4, 5; A.S.A. 1947, §§ 43-1234, 43-1235; Acts 2005, No. 1994, § 432.

Amendments. The 2005 amendment inserted "or herself" in (a)(1) and twice in (a)(2); in (a)(2), inserted "or she" and substituted "guilty of a Class D felony" for "deemed guilty of a felony and shall, upon conviction, be punished by a fine of not less than five hundred dollars ($500) nor

more than two thousand five hundred dollars ($2,500), or by imprisonment in the state penitentiary for not less than one (1) year nor more than five (5) years, or by both the fine and imprisonment"; and substituted "violation" for "misdemeanor" in (b)(1).

16-93-303. Procedure.

(a)(1)(A) Whenever an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the judge of the circuit or district court, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the court.

(B) However, no person who is found guilty of or pleads guilty or nolo contendere to a sexual offense as defined by § 5-14-101 et seq. and §§ 5-26-202, 5-27-602, 5-27-603, and 5-27-605 in which the victim was under eighteen (18) years of age shall be eligible for expungement of the record under this subchapter.

(2) Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

(3) Nothing in this subsection shall require or compel any court of this state to establish first offender procedures as provided in §§ 16-93-301 — 16-93-303, nor shall any defendant be availed the benefit of §§ 16-93-301 — 16-93-303 as a matter of right.

(b) Upon fulfillment of the terms and conditions of probation or upon release by the court prior to the termination period thereof, the defendant shall be discharged without court adjudication of guilt, whereupon the court shall enter an appropriate order which shall effectively dismiss the case, discharge the defendant, and expunge the record, if consistent with the procedures established in § 16-90-901 et seq.

History. Acts 1975, No. 346, §§ 2, 3; A.S.A. 1947, §§ 43-1232, 43-1233; Acts 1995, No. 998, § 9; 1999, No. 1407, § 1; 2003, No. 1185, § 219; 2003, No. 1753, § 2.

Amendments. The 2003 amendment by No. 1185 substituted "district court" for "municipal court, criminal or traffic division" in (a)(1)(A).

The 2003 amendment by No. 1753, in (a)(1)(B), substituted "§ 5-14-101 and §§ 5-26-202, 5-27-602, 5-27-603, and 5-27-605" for "§ 5-14-101 et seq." and made minor stylistic changes.

RESEARCH REFERENCES

ALR. Validity of requirement that, as condition of probation, defendant submit to warrantless searches. 99 ALR 5th 557.

Validity of condition of probation, supervised release, or parole restricting computer use or internet access. 4 A.L.R.6th 1.

CASE NOTES

Analysis

Applicability.
Adjudication of guilt.
Bail.
Expungement.
Violation of probation.

Applicability.

Subdivision (a)(1) of this section applies only to an accused who enters a plea of guilty or nolo contendere prior to an adjudication of guilt; where defendant was adjudged guilty by a jury, the trial court correctly determined that he was not entitled to probation under this section. Baker v. State, 310 Ark. 485, 837 S.W.2d 471 (1992).

Where it was clear this section was not utilized in defendant's prior cases even though the conviction judgment made a passing reference to it, defendant's argument that two prior criminal cases were expunged under this section and could not be used for enhancement purposes was not supported by the record. Baxter v. State, 324 Ark. 440, 922 S.W.2d 682 (1996).

Adjudication of Guilt.

Where the judgment entered recited on its face that appellant was found guilty and sentenced under the First Offenders Act, appellant was sentenced illegally. Gage v. State, 307 Ark. 285, 819 S.W.2d 279 (1991).

Bail.

A deferred guilty plea to a felony may be taken into consideration in fixing the amount and conditions of bail, however, the defendant cannot be denied release on bail as a matter of law because of the plea. Duncan v. State, 308 Ark. 205, 823 S.W.2d 886 (1992).

Expungement.

A trial court does not have the power to expunge a defendant's record when defendant was not sentenced under one of the statutes, such as subdivision (a)(1) of this section, § 16-93-502, or § 5-64-407, which specifically provide for expunging the record. Shelton v. State, 44 Ark. App. 156, 870 S.W.2d 398 (1994).

Defendant whose felony conviction was properly expunged under subsection (b) could not be subsequently prosecuted for being a felon in possession of a firearm under § 5-73-103 based on the expunged conviction. State v. Warren, 345 Ark. 508, 49 S.W.3d 103 (2001).

Violation of Probation.

Presence of marijuana in defendant's apartment was sufficient evidence from which the trial court could determine that defendant violated the terms of his probation. Harris v. State, 270 Ark. 634, 606 S.W.2d 93 (Ct. App. 1980); Gage v. State, 307 Ark. 285, 819 S.W.2d 279 (1991).

Cited: White v. State, 329 Ark. 487, 951 S.W.2d 556 (1997); White v. State, 330 Ark. 720, 957 S.W.2d 683 (1997); Harrell v. State, 331 Ark. 232, 962 S.W.2d 325 (1998); Thomas v. State, 349 Ark. 447, 79 S.W.3d 347 (2002).

16-93-304. Arkansas Crime Information Center.

(a) All district court judges and circuit court judges shall immediately report to the Arkansas Crime Information Center, in the form prescribed by the center, all probations of criminal defendants under §§ 16-93-301 — 16-93-303.

(b) Prior to granting probation to a criminal defendant under §§ 16-93-301 — 16-93-303, the court shall query the center to determine whether the criminal defendant has previously been granted probation under the provisions of §§ 16-93-301 — 16-93-303.

(c) If the center determines that an individual has utilized §§ 16-93-301 — 16-93-303 more than one time, the center shall notify the last sentencing judge of that fact.

History. Acts 1981, No. 581, § 1; A.S.A. 1947, § 43-1236; Acts 2005, No. 1994, § 278.

Amendments. The 2005 amendment substituted "district" for "municipal" in (a).

16-93-305. Sex offender may not reside with minor victim.

(a) Whenever an accused who enters a plea of guilty or nolo contendere prior to an adjudication of guilt for any sexual offense defined in § 5-14-101 et seq. or incest as defined in § 5-26-202 for a sexual offense or incest perpetrated against a minor is eligible for probation under procedures defined in § 16-93-303 or any other provision of law, as a condition of granting probation the court shall prohibit the accused, upon release, from residing in a residence with any minor unless the court makes a specific finding that the accused poses no danger to the minors residing in the residence.

(b) Upon violation of this condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided by law.

History. Acts 1997, No. 1188, § 1.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this section which was enacted subsequently.

Subchapter 4 — Probation — Suspension of Sentence

SECTION.
16-93-401. [Repealed.]
16-93-402. Probation officers.
16-93-403. [Repealed.]

Effective Dates. Acts 1973, No. 818, § 8: Apr. 16, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that some degree of confusion exists in the courts of this State concerning presentence and probation procedures available to courts in handling of persons convicted of crimes, and that the present status of the law concerning the suspension of sentences imposed upon such persons is not to the best interest of the public and the end of justice because the courts do not have sufficient guidelines and authority by which to employ their discretion in granting such suspension, nor do the counties have adequate presentence or probation officers to effectively carry out a rehabilitation program, and that this Act is immediately necessary to correct this situation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 326, § 2: approved Mar. 9, 1979. Emergency clause provided: "Whereas, the judicial redistricting which was effective January 1, 1979, changed the counties comprising many of the districts and is disrupting the supervision of criminal defendants on probation, it is found that this Act is in furtherance of the administration of justice and is necessary for the immediate preservation of the public peace, welfare and safety, and an emergency is hereby declared and this Act shall be in force and effect from and after its passage."

Acts 1991, No. 586, § 5: Mar. 18, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that Arkansas Code Annotated § 16-93-401 is in conflict with statutes contained in the Arkansas Criminal Code and is also unnecessarily duplicative of such statutes; that as a result of Arkansas Code Annotated § 16-93-401 being in effect great confusion exists as to the applicability of provisions governing the disposition of offenders; that such confusion has hampered courts in providing for the effective and proper disposition of offenders; that Arkansas Code Annotated § 16-93-401 must be repealed in its entirety to eliminate such confusion; that unless this act is given immediate effect the criminal justice system will not be able to function effectively regarding the disposition of of-

fenders. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

DiPippa, Suspending Imposition and Execution of Criminal Sentences, Etc., 10 UALR L.J. 367.

16-93-401. [Repealed.]

Publisher's Notes. This section, concerning grounds and conditions for probation, was repealed by Acts 1991, No. 586, § 1. The section was derived from Acts 1973, No. 818, § 1; 1981, No. 620, § 14; A.S.A. 1947, § 43-2331.

16-93-402. Probation officers.

(a)(1) When directed by the courts, the probation officers shall report to the court on the conduct and behavior of the probationer while on probation.

(2) The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him or her or may extend the probation, as shall seem advisable.

(b)(1) Whenever, during the period of his or her probation, a probationer placed on probation goes from the county in which he or she is being supervised to another county, jurisdiction over him or her may be transferred, in the discretion of the court, from the court for the county from which he or she goes to the court for the other county, with the concurrence of the latter court.

(2)(A) The court for the county to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the county from which the transfer was made.

(B) Under the same conditions this process may be repeated whenever during the period of his or her probation the probationer goes from the county in which he or she is being supervised to another county.

(c)(1) At any time within the probation period or within the maximum probation period permitted by § 16-93-401 [repealed], the court for the county in which the probationer is being supervised or, if no longer supervised, the court for the county in which he or she was last under supervision may issue a warrant for his or her arrest for violation of probation occurring during the probation period.

(2) The warrant may be executed by any peace officer authorized to make arrests under the laws of the State of Arkansas.

(3) If the probationer is arrested in any county other than that in which he or she was last supervised, he or she shall be returned to the county in which the warrant was issued.

(4) As speedily as possible, the probationer shall be taken before the court having jurisdiction over him or her.

(5) Thereupon, the court may revoke the probation and require the probationer to serve the sentence imposed or any lesser sentence which might have been originally imposed.

History. Acts 1973, No. 818, § 2; 1975, No. 602, § 1; 1979, No. 326, § 1; A.S.A. 1947, § 43-2332; Acts 1993, No. 549, § 9.

Cross References. Transfer of jurisdiction, § 5-4-308.

Violation of conditions, § 5-4-309.

CASE NOTES

Analysis

Purpose.
Failure to appeal.
Revocation of probation.
Violation of probation.

Purpose.

The legislature did not intend this section, as amended in 1979, to effect a basic change in probation procedures or prohibit a court from releasing a defendant on probation for a prescribed period of time without pronouncing sentence. McGee v. State, 271 Ark. 611, 609 S.W.2d 73 (1980).

Failure to Appeal.

Upon a revocation of probation, the court had only the authority to sentence defendant to the remainder of the original sentence; however, where the defendant did not appeal the imposition of a longer sentence, he was limited to post-conviction relief. Miller v. State, 13 Ark. App. 314, 683 S.W.2d 937 (1985).

Revocation of Probation.

As it was only the imposition of the sentence that was suspended during defendant's good behavior, upon the breach of that duty, the trial court had the right to impose the original ten-year sentence. Rutledge v. State, 263 Ark. 300, 564 S.W.2d 511 (1978).

The words "sentence imposed" in this section presume that a sentence has been pronounced and, where no sentence was pronounced until defendant's four-year probation was revoked, the language of this section had no application and provided him no relief. McGee v. State, 271 Ark. 611, 609 S.W.2d 73 (1980).

A second sentence cannot be imposed at a probation revocation hearing. Easley v. State, 274 Ark. 215, 623 S.W.2d 189 (1981).

Court did not err when it revoked the defendant's probation and sentenced him to ten years imprisonment even though the sentence imposed was longer than the probationary period. Williams v. State, 280 Ark. 543, 659 S.W.2d 948 (1983).

The $500 fine levied on the defendant was not the "sentence imposed" under the last sentence of this section; therefore, the court was not precluded from sentencing her to prison upon the revocation of probation. Diffee v. State, 290 Ark. 194, 718 S.W.2d 94 (1986).

In accepting defendant's guilty plea, adjudicating him guilty, and placing him on probation for five years, trial court did not impose a sentence on defendant and, upon revoking probation and sentencing defendant, was not limited to the length of the probation but could impose any sentence that it might have originally imposed for the charges to which defendant pleaded guilty. Lee v. State, 299 Ark. 187, 772 S.W.2d 324 (1989).

Where defendant was sentenced to five years imprisonment with four and one-half years suspended, the defendant could not be required, after revocation, to serve more than the remainder of his original sentence. Lyons v. State, 35 Ark. App. 29, 813 S.W.2d 262 (1991).

Although defendant argued that he should have been sentenced to the remainder of his five years' probation instead of ten years' imprisonment, under subsection (e) of this section, the trial court did not modify defendant's sentence

but rather revoked it pursuant to § 5-4-309, which was permissible; defendant was sentenced to five years' probation and fined, thus, there was no sentence imposed and the trial court did not err in sentencing him to ten years' imprisonment as it could have done originally. Rickenbacker v. Norris, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 198 (Mar. 31, 2005).

Violation of Probation.

Where a defendant has violated the terms of his probation, the court may impose a full ten-year suspended sentence despite five-year suspended sentence limitation in § 16-93-401. Rutledge v. State, 263 Ark. 300, 564 S.W.2d 511 (1978).

Where a trial court imposes a definite sentence upon acceptance of a guilty plea or a finding of guilt and orders that the execution of the sentence be suspended, this section limits the court's sentencing authority to imposition of a sentence not exceeding the length of the sentence originally imposed. Lewis v. State, 62 Ark. App. 150, 970 S.W.2d 299 (1998).

Cited: Culpepper v. State, 268 Ark. 263, 595 S.W.2d 220 (1980); Easley v. State, 274 Ark. 215, 623 S.W.2d 189 (1981); Gautreaux v. State, 22 Ark. App. 130, 736 S.W.2d 23 (1987).

16-93-403. [Repealed.]

Publisher's Notes. This section, concerning county probation advisory boards, was repealed by Acts 1993, No. 549, § 9. The section was derived from Acts 1973, No. 818, §§ 4, 5; A.S.A. 1947, §§ 43-2334, 43-2335.

Subchapter 5 — Alternative Service Act

SECTION.
16-93-501 — 16-93-510. [Repealed.]

16-93-501 — 16-93-510. [Repealed.]

Publisher's Notes. This subchapter, concerning the Alternative Service Act, was repealed by identical Acts 1993, Nos. 531 and 548, § 11. The subchapter was derived from the following sources:

16-93-501. Acts 1975, No. 378, § 1; 1983, No. 344, § 1; A.S.A. 1947, § 43-2339.

16-93-502. Acts 1975, No. 378, § 2; 1983, No. 229, § 2; 1983, No. 344, § 2; 1983, No. 795, §§ 1-3; A.S.A. 1947, § 43-2340; Acts 1989, No. 831, § 1.

16-93-503. Acts 1975, No. 378, § 8; A.S.A. 1947, § 43-2345.

16-93-504. Acts 1975, No. 378, § 11; 1983, No. 795, § 9; A.S.A. 1947, § 43-2348; Acts 1989, No. 831, § 2.

16-93-505. Acts 1975, No. 378, § 3; 1981, No. 905, § 1; 1983, No. 795, § 4; 1985, No. 592, § 1; A.S.A. 1947, § 43-2341; Acts 1989, No. 831, § 3.

16-93-506. Acts 1975, No. 378, § 10; 1983, No. 795, § 8; A.S.A. 1947, § 43-2347; Acts 1989, No. 831, § 4.

16-93-507. Acts 1975, No. 378, § 4; 1977, No. 670, § 1; 1983, No. 692, § 1; 1983, No. 795, § 5; A.S.A. 1947, § 43-2342; Acts 1989, No. 831, § 5.

16-93-508. Acts 1975, No. 378, § 9; 1977, No. 670, § 1; A.S.A. 1947, § 43-2346.

16-93-509. Acts 1975, No. 378, § 5; 1977, No. 670, § 1; 1983, No. 795, § 6; A.S.A. 1947, § 43-2343; Acts 1989, No. 831, § 6.

16-93-510. Acts 1975, No. 378, § 7; 1983, No. 795, § 7; A.S.A. 1947, § 43-2344; Acts 1987, No. 775, § 2; 1989, No. 831, § 7.

Subchapter 6 — Parole — Eligibility

SECTION.
16-93-601. Felonies committed prior to April 1, 1977.

SECTION.
16-93-602. Felonies committed between April 1, 1977, and April 1,

SECTION.
1983 — Purpose and construction of sections.
16-93-603. Felonies committed between April 1, 1977, and April 1, 1983 — Classification of inmates.
16-93-604. Felonies committed between April 1, 1977, and April 1, 1983 — Parole eligibility.
16-93-605. Felonies committed on or after April 1, 1983 — Purpose and construction of sections.
16-93-606. Felonies committed on or after April 1, 1983 — Classification of inmates.
16-93-607. Felonies committed on or after April 1, 1983 — Parole eligibility.
16-93-608. Class C or Class D felonies committed on or after April 1, 1983.
16-93-609. Effect of more than one conviction for certain felonies.
16-93-610. Computation of sentence.
16-93-611. Class Y felonies.

Effective Dates. Acts 1968 (1st Ex. Sess.), No. 50, § 46: Mar. 1, 1968. Emergency clause provided: "The General Assembly finds that the penal system of the State of Arkansas is in need of immediate reform, in order better to effectuate the rehabilitation of persons convicted of crime and to make possible their return as useful members of the community, and that the immediate passage of this Act is necessary to establish a Department of Correction to effectuate such rehabilitation. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after March 1, 1968."

Acts 1969, No. 48, § 4: became law over Governor's veto, Feb. 12, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that under the present provisions relating to paroles, a convicted person is eligible for parole without serving at least ⅓ of the time for which he was convicted; and that in order to clarify the parole eligibility provisions and to promote the more efficient administration of criminal justice in this State, it is necessary that this Act become effective immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

Acts 1969, No. 94, § 4: Feb. 24, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that legislation has recently been enacted providing for a First Offenders Penal Institution to which persons under twenty-one (21) years of age who are first convicted of a felony may be committed; that the purpose of establishing such institution is to separate first offenders and habitual and repeater criminals so that better educational and rehabilitation opportunities can be provided for first offenders; that in order to further the purposes of rehabilitating such first offenders it is believed that parole eligibility requirements for first offenders whether committed to the First Offenders Penal Institution or to the Department of Correction should be more lenient than those provided for habitual and repeater criminals; and, that this Act is immediately necessary to provide more liberal parole eligibility requirements for first offenders under the age of twenty-one years. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in effect from the date of its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1157, § 4: Feb. 11, 1976. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of Arkansas that the length of confinement of persons convicted of a crime using a deadly weapon is too lenient and that the enactment of this Act will provide for more stringent confinement requirements. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No.

1161, § 3: Feb. 11, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that under present law relating to the eligibility for parole for individuals serving a term of years in the State Penitentiary, credit for good time is allowed regardless of the number of times an individual is confined in such institution; that under present law the circuit judge has no authority to mandate, in the appropriate case, that an individual confined in the State Penitentiary serve not less than one half (½) of the sentence imposed with credit for good time; and that it is in the best interests of the citizens of this State that this Act be effective immediately upon its passage in order to encourage and promote the more efficient administration of justice. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 93, § 5: Apr. 1, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present system of parole eligibility does not adequately deter crime, especially the habitual offenders, and that such habitual offenders should have their parole eligibility bear a direct relationship to the number of times they have been incarcerated. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after April 1, 1977."

Acts 1983, No. 772, § 2: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the existing parole law allows persons who have repeatedly committed first degree murder, rape and aggravated robbery, as well as other felonies, to be eligible for release on parole; that second and subsequent offenders of first degree murder, rape and aggravated robbery should not be eligible for parole; that in order to implement said policy this Act should go into effect immediately. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 825, § 7: Apr. 1, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the parole eligibility established by this Act should be in effect on April 1, 1983, and that unless an emergency is declared that such will not occur. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after April 1, 1983."

Acts 1987, No. 990, § 3: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case Ricarte v. State, CR 86-31, a question has arisen over the validity of Act 1161 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1268, § 11: Apr. 9, 1999. Emergency clause provided: "It is found and determined by the General Assembly that the illegal use of the drug methamphetamine has become a serious problem in this State; that, because the drug is relatively easy to make, many illegal methamphetamine labs are operating in the state; that this act increases penalties for drug paraphernalia used to manufacture methamphetamine; and that this act is immediately necessary to combat illegal drug production and use in this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1337, § 5: Apr. 12, 1999.

Emergency clause provided: "It is found and determined by the Eighty-second General Assembly of the State of Arkansas that there is vagueness in the law regarding the limitations on the award of meritorious good time for persons convicted of certain crimes, that criminal defendants should not be left without this possible benefit due to the vagueness of language by the General Assembly, and that this act should have immediate effect in order to eliminate this problem as soon as possible for persons sentenced to serious criminal offenses. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2005, No. 1034, § 2: Emergency clause failed to pass. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that there is serious overcrowding in the Department of Correction facilities; that such overcrowding is likely to worsen unless appropriate action is taken immediately; and that this act is immediately necessary because it is designed to allow a procedure for helping to alleviate the overcrowding problem. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

16-93-601. Felonies committed prior to April 1, 1977.

(a) Death Sentence. An individual under sentence of death is not eligible for release on parole.

(b) Life Imprisonment. (1) An individual sentenced to life imprisonment prior to March 1, 1968, and any individual sentenced to life imprisonment after February 12, 1969, and before April 1, 1977, is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency. When the life sentence is commuted to a term of years, the individual is eligible for release on parole after having served one-third (⅓) of the time to which the life sentence is commuted, with credit for good-time allowances.

(2) An individual sentenced to life imprisonment on and after March 1, 1968, and prior to February 12, 1969, is eligible for release on parole after he or she serves fifteen (15) years of the sentence, with credit for good-time allowances not to exceed five (5) years.

(c) Sentence of Years. An individual sentenced to a term of years in the state penitentiary after February 11, 1976, and before April 1, 1977, is eligible for release on parole after he or she serves the following terms:

(1) An individual sentenced to a term of years for other than a Class Y felony who is confined in the state penitentiary for the second time is

eligible for release on parole after he or she serves one-third (⅓) of the time for which sentenced, with credit for good-time allowances, or one-third (⅓) of the time to which sentence is commuted by executive clemency, with credit for good-time allowances. However, a judge may require one-half (½) of the sentence as imposed, or one-half (½) of the sentence as commuted by executive clemency, to be served, with credit for good-time allowances.

(2) An individual sentenced to a term of years who is confined in the state penitentiary and who pleads guilty to or is convicted of a Class Y felony or who has previously been confined in the state penitentiary two (2) or more times is eligible for release on parole after he or she serves one-half (½) of the time to which the sentence is commuted by executive clemency, with credit for good-time allowances.

(d) Notwithstanding the provisions of subsections (a)-(c) of this section, the court may require anyone convicted of a crime involving the use of a deadly weapon to serve one-half (½) of the time for which sentenced, with credit for good-time allowances.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 28; 1969, No. 48, § 1; 1969, No. 94, § 1; 1975, No. 378, § 6; 1975 (Extended Sess., 1976), No. 1157, § 1; 1975 (Extended Sess., 1976), No. 1161, § 1; 1981, No. 620, § 15; A.S.A. 1947, § 43-2807; reen. Acts 1987, No. 990, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 990, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

CASE NOTES

Analysis

Constitutionality.
Change in parole law.
Cruel and unusual punishment.
Cumulative sentence.
Habeas corpus.
Jury instructions.
Liberty interest.
Recidivists.
Sentence of years.
Time of eligibility.

Constitutionality.

The disparity resulting from determining "good-time towards" credit and minimum parole eligibility time among various prisoners does not deny 14th amendment equal protection. West v. State, 257 Ark. 582, 518 S.W.2d 497 (1975).

Change in Parole Law.

Parole status is properly governed by the parole statute in effect at the time the crime was committed, not the statute in effect at the time of sentencing. Bosnick v. Lockhart, 283 Ark. 206, 677 S.W.2d 292 (1984).

Application of a parole statute less favorable to one who had been sentenced prior to its passage than the parole law existing at the time of his sentencing would be unconstitutional as an ex post facto law, in violation of Ark. Const., Art. 2, § 17. Bosnick v. Lockhart, 283 Ark. 206, 677 S.W.2d 292 (1984).

Cruel and Unusual Punishment.

Sentence was not cruel and unusual punishment, and defendant was not without any opportunity for parole eligibility since executive clemency was available by commutation of sentence. Rogers v. State, 257 Ark. 144, 515 S.W.2d 79 (1974), cert. denied, 421 U.S. 930, 95 S. Ct. 1656, 44 L. Ed. 2d 87 (1975).

Cumulative Sentence.

Cumulative minimum meant the minimum sentence possible to be served under the provisions of this section, and cumu-

lative maximum meant the total amount of time fixed for incarceration, as shown by the face of the commitments, considered as a single cumulative commitment. Jackson v. State, 254 Ark. 246, 492 S.W.2d 897 (1973).

Where petitioner was sentenced to a six year prison term and later, but before being incarcerated, was given a one year term for escape, the sentences were considered cumulatively as a seven year sentence. Jackson v. State, 254 Ark. 246, 492 S.W.2d 897 (1973).

Habeas Corpus.

A writ of habeas corpus is not the appropriate method to challenge the determination of parole eligibility; habeas corpus petitions are restricted to the questions of whether the petitioner is in custody pursuant to a valid conviction or whether the convicting court had proper jurisdiction. Bargo v. Lockhart, 279 Ark. 180, 650 S.W.2d 227 (1983).

Jury Instructions.

Although the trial court should not attempt to explain matters concerning parole, a trial court can recite to the jury that capital murder is punishable by imprisonment for life without parole, and the jury may receive a verdict form reflecting that language. Robertson v. State, 304 Ark. 332, 802 S.W.2d 920 (1991).

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the board's discretion to determine which eligible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

This section does not create a liberty interest. Pittman v. Gaines, 905 F.2d 199 (8th Cir. 1990).

Recidivists.

There was no prejudice to defendant resulting from the trial court's statement in the judgment that, in view of evidence showing this to be the defendant's second offense, he would have to serve one-third of his sentence before he became eligible for parole. Watson v. State, 271 Ark. App. 661, 609 S.W.2d 673 (1980).

Sentence of Years.

Sentence of imprisonment for not less than 30 nor more than 90 years was not an indeterminate sentence, but a sentence of 90 years, with one third of it to be served before the prisoner became eligible for parole. Moore v. State, 262 Ark. 27, 553 S.W.2d 29 (1977).

Where defendant's sentence was life imprisonment without parole instead of life imprisonment, before defendant could be subject to be released on parole, his sentence must be commuted to a term of years by executive clemency. Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979).

Sentence for life was not subject to parole unless executive clemency was first obtained, but if sentence was commuted, and if defendant had served one-third of the newly fixed term of years, the defendant became immediately eligible for parole. Rogers v. Britton, 476 F. Supp. 1036 (E.D. Ark. 1979), rev'd on other grounds, 631 F.2d 572 (8th Cir. 1980), cert. denied, 451 U.S. 939, 101 S. Ct. 2021, 68 L. Ed. 2d 327 (1981).

Time of Eligibility.

A prisoner is not eligible for parole at all until he has been sentenced. Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969).

Under this section, a prisoner can be eligible for parole immediately only if the sentence has not provided otherwise. Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969).

Prisoner who had served sufficient time in out-of-state penitentiary was entitled to release under concurrent Arkansas sentence. Campbell v. State, 253 Ark. 307, 485 S.W.2d 748 (1972).

Evidence supported finding that there had been no difference between what the defendant had bargained for and what the trial court had ordered so that any cause of action the defendant had would be only against the Department of Correction for the method it used in computing his parole eligibility date. Houff v. State, 268 Ark. 19, 593 S.W.2d 39 (1980).

Three sentences totaling 56 years must, for parole eligibility purposes, be treated as a single commitment for that length of time. Welch v. State, 269 Ark. 208, 599 S.W.2d 717, cert. denied, 449 U.S. 996, 101 S. Ct. 535, 66 L. Ed. 2d 294 (1980).

Cited: Andrews v. State, 251 Ark. 279, 472 S.W.2d 86 (1971); Patterson v. State, 253 Ark. 393, 486 S.W.2d 19 (1972); Jackson v. State, 254 Ark. 246, 492 S.W.2d 897 (1973); Clark v. Lockhart, 379 F. Supp. 1320 (E.D. Ark. 1974), aff'd, 512 F.2d 235

(8th Cir. 1975), cert. denied, 423 U.S. 872, 96 S. Ct. 139, 46 L. Ed. 2d 103 (1975); Rogers v. Britton, 466 F. Supp. 397 (E.D. Ark. 1979); Mabry v. Johnson, 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984); Mahfouz v. Lockhart, 826 F.2d 791 (8th Cir. 1987); Hale v. Lockhart, 903 F.2d 545 (8th Cir. 1990).

16-93-602. Felonies committed between April 1, 1977, and April 1, 1983 — Purpose and construction of sections.

(a) It is the purpose and intent of §§ 16-93-602 — 16-93-604 to establish parole eligibility for a person convicted of a felony committed on or after April 1, 1977, and prior to April 1, 1983.

(b) Nothing in §§ 16-93-602 — 16-93-604 is to be construed to repeal the parole eligibility laws in effect on the date criminal offenses were committed prior to April 1, 1977.

History. Acts 1977, No. 93, § 3; A.S.A. 1947, § 43-2830.

CASE NOTES

Analysis

Constitutionality.
Purpose.
Applicability.
Sentencing.

Constitutionality.

This classification scheme of inmates to establish parole eligibility violates no constitutional due process right; there is no constitutional right or entitlement to parole. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983).

This section and §§ 16-93-603, 16-93-604, which provide for the classification of convicted felons for purposes of parole eligibility based on the number of prior convictions, do not violate the constitutions of the United States and this state. Blevins v. Norris, 291 Ark. 70, 722 S.W.2d 573, cert. denied, 481 U.S. 1040, 107 S. Ct. 1980, 95 L. Ed. 2d 819 (1987).

Purpose.

Acts 1977, No. 93, was intended to deal not only with the offense for which a prisoner is presently incarcerated but also previous incarcerations. Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984).

Purpose of this section is to lengthen period of confinement before parole eligibility as number of prior convictions increases. Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

Applicability.

No person may have the relatively more stringent parole eligibility requirements contained in this section and §§ 16-93-603 and 16-93-604 applied to him if his latest felony — that for which he is now being classified — occurred prior to April 1, 1977; instead, the appropriate law would be that effective at the time the crime was committed. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983).

This section and §§ 16-93-603 and 16-93-604 are applicable to individuals whose latest felony occurred after April 1, 1977; where this section and §§ 16-93-603, 16-93-604 apply, those felony convictions occuring prior to April 1, 1977, may be computed for purposes of tallying the individual's number of convictions. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983).

The fact that defendant's previous incarcerations occurred before the effective date of this section was irrelevant where he was currently incarcerated for felony committed after April 1, 1977. Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984).

Nothing in this section and §§ 16-93-603 and 16-93-604 requires that a prisoner be adjudicated a habitual offender before the sections become applicable. Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984).

The application of this section and §§ 16-93-603 and 16-93-604 to a defendant who was convicted of murder in 1968 and sentenced to life imprisonment was a

violation of the ex post facto provisions of the Arkansas and United States constitutions because this section and §§ 16-93-603 and 16-93-604 were not in effect at the time defendant's first crime was committed, even though the defendant committed a second felony in 1978 which resulted in the addition of three years to the original life sentence. Bosnick v. Lockhart, 283 Ark. 206, 677 S.W.2d 292 (1984).

Sentencing.

Sentencing is the domain of the trial court and parole is entirely within the control of the parole board; a decision on parole eligibility does not affect sentencing and such a decision can neither enlarge nor reduce the sentence determined by the trial court; therefore, this section and §§ 16-93-603 and 16-93-604 are parole law, not sentencing law. Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984).

Sentence held not improperly computed after second conviction. Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

Cited: Houff v. State, 268 Ark. 19, 593 S.W.2d 39 (1980); Wells v. State, 279 Ark. 55, 648 S.W.2d 466 (1983); Hill v. Lockhart, 731 F.2d 568 (8th Cir. 1984); Fain v. State, 286 Ark. 35, 688 S.W.2d 940 (1985); Clawitter v. Lockhart, 286 Ark. 13, 689 S.W.2d 558 (1985); Schwindling v. Smith, 777 F.2d 431 (8th Cir. 1985); Wiggins v. Lockhart, 825 F.2d 1237 (8th Cir. 1987); Garner v. Howell, 840 F.2d 616 (8th Cir. 1988).

16-93-603. Felonies committed between April 1, 1977, and April 1, 1983 — Classification of inmates.

For the purposes of §§ 16-93-602 — 16-93-604, inmates are to be classified as follows:

(1) A first offender is an inmate convicted of one (1) or more felonies but who has not been incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified;

(2) A second offender is a inmate convicted of two (2) or more felonies who has been incarcerated one (1) time in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified;

(3) A third offender is an inmate convicted of three (3) or more felonies who has been incarcerated two (2) times in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified; and

(4) A fourth offender is an inmate convicted of four (4) or more felonies who has been incarcerated three (3) or more times in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified.

History. Acts 1977, No. 93, § 1; A.S.A. 1947, § 43-2828.

CASE NOTES

Analysis

Constitutionality.
Purpose.
Applicability.
Attack on prior conviction.
Judicial determination.
Liberty interest.
Sentencing.
Subsequent offenses.
Third offenders.

Constitutionality.

This classification scheme of inmates to establish parole eligibility violates no constitutional due process right; there is no constitutional right or entitlement to parole. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983); Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

This section and §§ 16-93-602 and 16-93-604, which provide for the classification of convicted felons for purposes of parole eligibility based on the number of prior convictions, do not violate the constitutions of the United States and this state. Blevins v. Norris, 291 Ark. 70, 722 S.W.2d 573, cert. denied, 481 U.S. 1040, 107 S. Ct. 1980, 95 L. Ed. 2d 819 (1987).

Applying §§ 16-93-602 through 16-93-604 to a prisoner without a prior determination by the sentencing court that its provisions apply to him does not violate due process, and alleged errors in the interpretation or application of these sections does not state a federal due process cause of action where the state provides a forum for redetermination of the contested date. Garner v. Howell, 840 F.2d 616 (8th Cir. 1988).

Purpose.

Purpose of this section is to lengthen period of confinement before parole eligibility as number of prior convictions increases. Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

Applicability.

No person may have the relatively more stringent parole eligibility requirements contained in this section and §§ 16-93-602 and 16-93-604 applied to him if his latest felony — that for which he is now being classified — occurred prior to April 1, 1977; instead, the appropriate law would be that effective at the time the crime was committed. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983).

Attack on Prior Conviction.

The earlier of two convictions may be used for purposes of parole ineligibility because nothing suggests that, in determining parole eligibility, a state must look behind a valid judgment of conviction upon a guilty plea where the record shows the defendant to have been represented by counsel. St. John v. Lockhart, 286 Ark. 234, 691 S.W.2d 148 (1985).

Judicial Determination.

Fact that there had been no judicial determination that plaintiff fits the classification of fourth offender did not invalidate his classification as a fourth offender for parole eligibility purposes. Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984).

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the board's discretion to determine which eligible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

Sentencing.

Sentence held not improperly computed after second conviction. Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

Subsequent Offenses.

The increase in the time defendant was required to serve before he would be eligible for parole resulted from his commission of subsequent offenses and had nothing to do with any change in legislation. Gilmer v. Massey, 303 Ark. 634, 799 S.W.2d 526 (1990).

Third Offenders.

Where defendant was previously convicted of a felony in 1975 and served one year of a five-year sentence with four years suspended, but violated parole in 1978 and served the remaining four years, and in 1979, was convicted of a felony and sentenced to five years imprisonment, the

defendant was properly classified as a third offender when he was convicted of five felonies in 1983 and received five concurrent 10-year sentences. Patterson v. Smith, 289 Ark. 564, 712 S.W.2d 922 (1986).

Cited: Bosnick v. Lockhart, 283 Ark. 206, 677 S.W.2d 292 (1984); Brown v. Lockhart, 288 Ark. 483, 707 S.W.2d 304 (1986); Wiggins v. Lockhart, 825 F.2d 1237 (8th Cir. 1987); Fruit v. Lockhart, 304 Ark. 457, 802 S.W.2d 930 (1991); Abdullah v. Lockhart, 780 F. Supp. 1221 (E.D. Ark 1991).

16-93-604. Felonies committed between April 1, 1977, and April 1, 1983 — Parole eligibility.

(a) A person who committed felonies prior to April 1, 1977, and who was convicted and incarcerated therefor, is eligible for release on parole in accordance with the parole eligibility law in effect at the time the crime was committed.

(b) A person who committed felonies on and after April 1, 1977 and prior to April 1, 1983, and who has been convicted and incarcerated therefor, is eligible for release on parole as follows:

(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have his or her sentence commuted by the Governor, as provided by law. An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency. Upon commutation, the inmate is eligible for release on parole as provided in this section;

(2) An inmate classified as a first offender under § 16-93-603, except one under the age of twenty-one (21) as described in subsection (c) of this section and except one who pleads guilty or has been convicted of a Class Y felony, upon entering a correctional institution in this state under sentence from a circuit court is not eligible for release on parole until a minimum of one-third (⅓) of his or her sentence has been served, with credit for good-time allowances, or one-third (⅓) of the time to which the sentence is commuted by executive clemency is served, with credit for good-time allowances. However, if the trier of fact determines that a deadly weapon was used in the commission of the crime, a first offender twenty-one (21) years of age or older shall not be eligible for release on parole until a minimum of one-half (½) of the sentence is served, with credit for good-time allowances;

(3) An inmate classified as a second offender under § 16-93-603 and one who pleads guilty or is convicted of a Class Y felony, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of one-half (½) of his or her sentence is served, with credit for good-time allowances, or one-half (½) of the time to which sentence is commuted by executive clemency, with credit for good-time allowances;

(4) An inmate classified as a third offender under § 16-93-603, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of three-fourths (¾) of their sentence is served, with credit for good-time allowances, or three-fourths (¾) of the time to which sentence is

commuted by executive clemency, with credit for good-time allowances; and

(5) An inmate classified as a fourth offender under § 16-93-603, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for parole, but is entitled to good-time allowances as provided by law.

(c) Any person under the age of twenty-one (21) who is first convicted of a felony and committed to the first offender penal institution or to the Department of Correction for a term of years is eligible for parole at any time, unless a minimum time to be served is imposed consisting of not more than one-third (⅓) of the total time sentenced. In the event the individual is sentenced to a minimum time to be served, he or she is eligible for release on parole after serving the minimum time prescribed, with credit for good-time allowances, and for commutation by the exercise of executive clemency.

(d)(1) When any convicted felon, while on parole, is convicted of another felony, the felon is to be committed to the Department of Correction to serve the remainder of his or her original sentence, including any portion suspended, with credit for good-time allowances. Upon conviction for the subsequent felony, the court is to require the sentence for the subsequent felony to be served consecutively with the sentence for the previous felony.

(2) Any person found guilty of a felony and placed on probation or suspended sentence therefor who is subsequently found guilty of another felony committed while on probation or suspended sentence is to be committed to the Department of Correction to serve the remainder of his or her suspended sentence plus the sentence imposed for the subsequent felony. The sentence imposed for the subsequent felony is to be served consecutively with the remainder of the suspended sentence.

(e) For parole eligibility purposes, consecutive sentences by one (1) or more courts or for one (1) or more counts is considered as a single commitment reflecting the cumulative sentence to be served.

(f) Nothing in this section shall be construed to reduce, lessen, or in any manner take away or affect the good-time allowances earned by any individual prior to April 1, 1977.

History. Acts 1977, No. 93, § 2; 1981, No. 620, § 16; A.S.A. 1947, § 43-2829.

RESEARCH REFERENCES

UALR L.J. Arkansas Law Survey, Irving and Schoen, Criminal Procedure, 9 UALR L.J. 129.

CASE NOTES

Analysis

Constitutionality.
Purpose.
Applicability.
Authority to determine eligibility.
Consecutive sentences.

Double jeopardy.
Habeas corpus.
Liberty interest.
Post-conviction relief.
Prior convictions.
Sentencing.
Third offenders.

Constitutionality.

This classification scheme of inmates to establish parole eligibility violates no constitutional due process right; there is no constitutional right or entitlement to parole. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983).

Subdivision (b)(5) of this section not void for vagueness; the proscribed activity is committing four or more felonies, and the result is ineligibility for parole. Fain v. State, 286 Ark. 35, 688 S.W.2d 940 (1985).

Subsection (b) of this section does not violate the ex post facto clause of the United States constitution because it is not retrospective and it does not disadvantage the offender affected by it. Brown v. Lockhart, 288 Ark. 483, 707 S.W.2d 304 (1986).

This section and §§ 16-93-602 and 16-93-603, which provide for the classification of convicted felons for purposes of parole eligibility based on the number of prior convictions, do not violate the constitutions of the United States and this state. Blevins v. Norris, 291 Ark. 70, 722 S.W.2d 573, cert. denied, 481 U.S. 1040, 107 S. Ct. 1980, 95 L. Ed. 2d 819 (1987).

Purpose.

The obvious intent of subdivision (b)(4) of this section is to lengthen the period of confinement before parole eligibility as the number of prior convictions increases. Tisdale v. Lockhart, 288 Ark. 203, 703 S.W.2d 849 (1986).

Purpose of this section is to lengthen period of confinement before parole eligibility as number of prior convictions increases. Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

Applicability.

No person may have the relatively more stringent parole eligibility requirements contained in this section applied to him if his latest felony — that for which he is now being classified — occurred prior to April 1, 1977; instead, the appropriate law would be that effective at the time the crime was committed. Stuart v. Lockhart, 587 F. Supp. 1 (E.D. Ark. 1983).

Authority to Determine Eligibility.

Determining parole eligibility according to the sentences imposed by the trial courts is the prerogative of the Department of correction. Fain v. State, 286 Ark. 35, 688 S.W.2d 940 (1985).

Consecutive Sentences.

In determining parole eligibility status when consecutive sentences are involved, the parole eligibility statute governing the original sentence is the one that should control the cumulative sentence. Bosnick v. Lockhart, 283 Ark. 206, 677 S.W.2d 292 (1984).

Where the defendant was convicted of a rape committed while he was on probation from a federal conviction for possession of a stolen government check, the 35-year sentence for rape was not being served consecutively with his sentence on the federal felony conviction; consequently, subsections (d) and (e) of this section were not applicable, and the defendant had to serve a minimum of one-half of the 35 year sentence, with credit for good time, before he would become eligible for parole under subdivision (b)(3) of this section. Brown v. Lockhart, 288 Ark. 483, 707 S.W.2d 304 (1986).

Double Jeopardy.

A defendant who was sentenced as a habitual offender and determined to be ineligible for parole until he had served three-fourths of his sentence was not placed in double jeopardy; denial of parole is not a new punishment for purposes of double jeopardy. Clawitter v. Lockhart, 286 Ark. 131, 689 S.W.2d 558 (1985).

Habeas Corpus.

A writ of habeas corpus is not the appropriate method to challenge the determination of parole eligibility; habeas corpus petitions are restricted to the questions of whether the petitioner is in custody pursuant to a valid conviction or whether the convicting court had proper jurisdiction. Bargo v. Lockhart, 279 Ark. 180, 650 S.W.2d 227 (1983).

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the board's discretion to determine which eli-

gible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

Post-Conviction Relief.

Where there was voluntary plea on defendant's part, since there was substantial, if not technical, compliance with ARCrP 24.4 by the trial judge, defendant's remedy concerning parole eligibility, if any, was an action against the Department of Corrections rather than a proceeding under ARCrP 37. Clark v. State, 271 Ark. 866, 611 S.W.2d 502 (1981).

Evidence showed defendant's allegation was not an allegation that could properly be considered on a petition for post-conviction relief because it attacked the execution of the sentence rather than the validity of the sentence imposed by the trial court; furthermore, any action the defendant might have as to the correctness of the computation of his sentence and the execution thereof would be against the Department of Correction. Bosnick v. State, 275 Ark. 52, 627 S.W.2d 23 (1982).

Evidence showed trial court did not err in denying the defendant's motion to vacate or modify sentence based on the defendant's claim of ineffective assistance of counsel in that he was not informed, prior to his plea, that he would be subject to the provisions of this section. Wells v. State, 279 Ark. 55, 648 S.W.2d 466 (1983).

A question involving parole eligibility is not an attack on the validity of the sentence imposed but rather is an attack on the execution of the sentence; such a challenge is not a proper matter to be considered in a petition for post-conviction relief. Carter v. State, 283 Ark. 23, 670 S.W.2d 439 (1984).

Defendant was not entitled to post-conviction relief on the ground that his plea was rendered involuntarily. Carter v. State, 283 Ark. 23, 670 S.W.2d 439 (1984).

Prior Convictions.

An unconstitutional prior conviction cannot be used in determining parole eligibility. Abdullah v. Lockhart, 780 F. Supp. 1221 (E.D. Ark 1991).

Sentencing.

Sentence held not improperly computed after second conviction. Michalek v. Lockhart, 292 Ark. 301, 730 S.W.2d 210 (1987).

Trial court cannot modify a valid sentence once execution has begun; thus, trial court, which had the discretion at the initial sentencing of imposing sentences concurrently or consecutively, made sentences concurrent and, having done so, had no power to change them to consecutive sentences after execution had begun. Avants v. State, 293 Ark. 24, 732 S.W.2d 149 (1987).

Third Offenders.

Where defendant committed his third felony while on parole from a 21-year sentence and received a 10-year sentence, which was to run concurrently with the 21-year sentence, the defendant was not eligible for parole under subdivision (b)(4) of this section until he had served three-fourths of the 10-year sentence, with credit for good-time, which would be later than his parole eligibility under the earlier 21-year sentence. Tisdale v. Lockhart, 288 Ark. 203, 703 S.W.2d 849 (1986).

Cited: Houff v. State, 268 Ark. 19, 593 S.W.2d 39 (1980); Hill v. Lockhart, 731 F.2d 568 (8th Cir. 1984); Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984); Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Walker v. Lockhart, 807 F.2d 136 (8th Cir. 1986); Wiggins v. Lockhart, 825 F.2d 1237 (8th Cir. 1987); Woods v. Lockhart, 292 Ark. 37, 727 S.W.2d 849 (1987); Garner v. Howell, 840 F.2d 616 (8th Cir. 1988); Chenowith v. State, 26 Ark. App. 256, 763 S.W.2d 103 (1989); Ford v. Lockhart, 904 F.2d 458 (8th Cir. 1990); Abdullah v. Lockhart, 302 Ark. 506, 790 S.W.2d 440 (1990).

16-93-605. Felonies committed on or after April 1, 1983 — Purpose and construction of sections.

(a) It is the purpose and intent of this section and §§ 16-93-606 — 16-93-608 to establish parole eligibility for persons convicted of felonies committed on or after April 1, 1983.

(b) Nothing in this section or §§ 16-93-606 — 16-93-608 shall be construed to repeal the parole eligibility laws in effect on the date criminal offenses were committed prior to April 1, 1983.

History. Acts 1983, No. 825, § 5; A.S.A. 1947, § 43-2830.5.

16-93-606. Felonies committed on or after April 1, 1983 — Classification of inmates.

(a) As used in this section, "felony" means a crime classified as Class Y, Class A, or Class B by the laws of this state.

(b) For the purposes of § 16-93-607, inmates shall be classified as follows:

(1) A first offender is an inmate convicted of one (1) or more felonies but who has not been incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified;

(2) A second offender is an inmate convicted of two (2) or more felonies and who has been once incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified;

(3) A third offender is an inmate convicted of three (3) or more felonies and who has been twice incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified; and

(4) A fourth offender is an inmate convicted of four (4) or more felonies and who has been incarcerated in some correctional institution in the United States, whether local, state, or federal, three (3) or more times for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which he or she is being classified.

History. Acts 1983, No. 825, §§ 1, 2; A.S.A. 1947, §§ 43-2830.1, 43-2830.2.

CASE NOTES

Analysis

Felony classification.
Liberty interest.
Sentence.

Felony Classification.

Inmate's petition for a writ of mandamus filed against officials of the Department of Corrections, in which he contended that the Department improperly classified him as a third offender for parole-eligibility purposes, was properly denied as the record was insufficient for the appellate court to determine whether a

1989 conviction for possession of crack cocaine, in violation of § 5-64-401, fell under subsection (a) or (c) of the statute and, thus, the felony classification for the conviction; furthermore, the precise subsection under which inmate was convicted was a critical component in determining his status under this section. Robertson v. Norris, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 96 (Feb. 10, 2005).

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the board's discretion to determine which eligible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

Sentence.

There is no provision under Arkansas law or the United States Constitution which prohibits a sentence of a term of years which exceeds usual life span of human beings. Malone v. State, 294 Ark. 127, 741 S.W.2d 246 (1987).

16-93-607. Felonies committed on or after April 1, 1983 — Parole eligibility.

(a) As used in this section, "felony" means a crime classified as Class Y, Class A, or Class B by the laws of this state.

(b) A person who committed a felony prior to April 1, 1983, and who were convicted and incarcerated for that felony, shall be eligible for release on parole in accordance with the parole eligibility law in effect at the time the crime was committed.

(c) A person who commits felonies on or after April 1, 1983, and who shall be convicted and incarcerated for that felony, shall be eligible for release on parole as follows:

(1) An inmate under sentence of death or life imprisonment without parole is not eligible for release on parole but may be pardoned or have their sentence commuted by the Governor, as provided by law. An inmate sentenced to life imprisonment is not eligible for release on parole unless the sentence is commuted to a term of years by executive clemency. Upon commutation, the inmate is eligible for release on parole as provided in this section;

(2) An inmate classified as a first offender under § 16-93-606, except one under the age of twenty-one (21) years as described in subsection (d) of this section and except one who pleads guilty or has been convicted of a Class Y felony, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of one-third (⅓) of the time to which the sentence is commuted by executive clemency is served, with credit for good-time allowances. However, if the trier of fact determines that a deadly weapon was used in the commission of the crime, a first offender twenty-one (21) years of age or older is not eligible for release on parole until a minimum of one-half (½) of the sentence is served, with credit for good-time allowances;

(3) An inmate classified as a second offender under § 16-93-606 and one who pleads guilty or was convicted of a Class Y felony, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of one-half (½) of his or her sentence shall have been served, with credit for good-time allowances, or one-half (½) of the time to which the

sentence is commuted by executive clemency is served, with credit for good-time allowances;

(4) An inmate classified as a third offender under § 16-93-606, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for release on parole until a minimum of three-fourths (¾) of his or her sentence shall have been served, with credit for good-time allowances, or three-fourths (¾) of the time to which the sentence is commuted by executive clemency shall have been served, with credit for good-time allowances; and

(5) An inmate classified as a fourth offender under § 16-93-606, upon entering a correctional institution in this state under sentence from a circuit court, is not eligible for parole, but he or she shall be entitled to good-time allowances as provided by law.

(d) Any person under the age of twenty-one (21) years who is first convicted of a felony and committed to the first offender penal institution or to the Department of Correction for a term of years is eligible for parole at any time unless a minimum time to be served is imposed consisting of not more than one-third (⅓) of the total time sentenced. In the event the individual is sentenced to a minimum time to be served, he or she is eligible for release on parole after serving the minimum time prescribed, with credit for good-time allowances, and for commutation by the exercise of executive clemency.

(e)(1) When any convicted felon, while on parole, is convicted of another felony, the felon is to be committed to the Department of Correction to serve the remainder of his or her original sentence, including any portion suspended, with credit for good-time allowances. Upon conviction for the subsequent felony, the court shall require the sentence for the subsequent felony to be served consecutively with the sentence for the previous felony.

(2) Any person found guilty of a felony and placed on probation or suspended sentence therefor who is subsequently found guilty of another felony committed while on probation or suspended sentence is to be committed to the Department of Correction to serve the remainder of his or her suspended sentence plus the sentence imposed for the subsequent felony. The sentence imposed for the subsequent felony is to be served consecutively with the remainder of the suspended sentence.

(f) For parole eligibility purposes, consecutive sentences by one (1) or more courts or for one (1) or more counts are to be considered as a single commitment reflecting the cumulative sentence to be served.

(g) Nothing in this section shall be construed to reduce, lessen, or in any manner take away or affect the good-time allowances earned by any individual prior to April 1, 1983.

History. Acts 1983, No. 825, §§ 1, 3; A.S.A. 1947, §§ 43-2830.1, 43-2830.3.

RESEARCH REFERENCES

UALR L.J. Survey — Criminal Procedure, 10 UALR L.J. 149.

CASE NOTES

Analysis

Felony classification.
Amendments to statute.
Authority to revoke probation.
Liberty interest.
Sentence.

Felony Classification.

Inmate's petition for a writ of mandamus filed against officials of the Department of Corrections, in which he contended that the Department improperly classified him as a third offender for parole-eligibility purposes, was properly denied as the record was insufficient for the appellate court to determine whether a 1989 conviction for possession of crack cocaine, in violation of § 5-64-401, fell under subsection (a) or (c) of the statute and, thus, the felony classification for the conviction; furthermore, the precise subsection under which inmate was convicted was a critical component in determining his status under this section. Robertson v. Norris, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 96 (Feb. 10, 2005).

Amendments to Statute.

Parole eligibility is determined by the law in effect at the time the crime is committed and, therefore, a more favorable version of the statute enacted after a defendant's crime will not apply to him. Boles v. Huckabee, 340 Ark. 410, 12 S.W.3d 201 (2000).

Authority to Revoke Probation.

Where, while the defendant was serving probation imposed by the court of one county, he was convicted of an unrelated felony by the court of a second county, the court of the second county was without authority to revoke his probation; instead, the defendant should have been returned to the first county for a revocation hearing. Gill v. State, 290 Ark. 1, 716 S.W.2d 746 (1986).

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the board's discretion to determine which eligible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

Sentence.

There is no provision under Arkansas law or the United States Constitution which prohibits a sentence of a term of years which exceeds usual life span of human beings. Malone v. State, 294 Ark. 127, 741 S.W.2d 246 (1987).

Although subdivision (e)(1) of this section speaks in terms of revoking parole and returning a felon to the Department of Correction, there is no material difference between parole from a state sentence and parole from a federal institution where the defendant is serving state time concurrently with the federal sentence; therefore, where the circuit court ordered that its 30-year sentence should run consecutively to such state sentences, its order was not in error. Kelley v. Washington, 311 Ark. 73, 843 S.W.2d 797 (1992).

Defendant's sentence that required defendant to serve his Class D and Class C felony convictions consecutively with a sentence for revocation of parole was not illegal because the restrictions on imposing a consecutive sentence under subdivision (e)(1) of this section applied only to convictions for a Class Y, Class A, or Class B felony. Campea v. State Circuit Judge, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 546 (June 30, 2004).

Cited: Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984); Smith v. State, 300 Ark. 291, 778 S.W.2d 924 (1989); Blanks v. State, 300 Ark. 398, 779 S.W.2d 168 (1989); Cranford v. State, 303 Ark. 393, 797 S.W.2d 442 (1990); Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991); Logan v. Lockhart, 994 F.2d 1324 (8th Cir. 1993), cert. denied, 510 U.S. 1057, 114 S. Ct. 722, 126 L. Ed. 2d 686 (1994); Stephens v. State, 328 Ark. 81, 941 S.W.2d 411 (1997).

16-93-608. Class C or Class D felonies committed on or after April 1, 1983.

A person who commits a Class C felony or Class D felony on or after April 1, 1983, and who is incarcerated therefor is eligible for release on parole after having served one-third (⅓) of his or her sentence, with credit for good-time allowances, or one-third (⅓) of the time to which his or her sentence is commuted by executive clemency, with credit for good-time allowances.

History. Acts 1983, No. 825, § 4; A.S.A. 1947, § 43-2830.4.

CASE NOTES

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the board's discretion to determine which eligible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

16-93-609. Effect of more than one conviction for certain felonies.

(a) Any person who commits murder in the first degree, § 5-10-102, rape, § 5-14-103, or aggravated robbery, § 5-12-103, subsequent to March 24, 1983, and who has previously been found guilty of or pleaded guilty or nolo contendere to murder in the first degree, § 5-10-102, rape, § 5-14-103, or aggravated robbery, § 5-12-103, shall not be eligible for release on parole by the Parole Board.

(b)(1) Any person who commits a violent felony offense or any felony sex offense subsequent to August 13, 2001, and who has previously been found guilty of or pleaded guilty or nolo contendere to any violent felony offense or any felony sex offense shall not be eligible for release on parole by the board.

(2) For purposes of this subsection, "a violent felony offense or any felony sex offense" means those offenses listed in § 5-4-501(d)(2).

History. Acts 1983, No. 772, § 1; A.S.A. 1947, § 43-2807.1; Acts 2001, No. 1805, § 1.

Amendments. The 2001 amendment rewrote this section.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

CASE NOTES

Analysis

Liberty interest.
Parole.

Liberty Interest.

A liberty interest is not created by this section and this section does not limit the

board's discretion to determine which eligible inmates shall be paroled. Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

Parole.

Department of Corrections calculated prisoner's parole time in accordance with the law in effect at the time his second offense was committed and, in doing so, it correctly determined he must serve the entire sentence he received for that offense; while such a determination may indirectly affect any parole eligibility he may have otherwise received for his other prior convictions, his parole status was determined by the correct parole statutes in effect at the time prisoner committed his numerous crimes. Woods v. Lockhart, 292 Ark. 37, 727 S.W.2d 849 (1987).

16-93-610. Computation of sentence.

(a) Time served is deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction. It shall continue only during the time in which a prisoner is actually confined in a county jail or other local place of lawful confinement or while under the custody and supervision of the department.

(b) When the sentencing judge imposes sentence, he or she is to direct that the time already served by the defendant in jail or other place of detention is to be credited against the defendant.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 34; A.S.A. 1947, § 43-2813; Acts 2005, No. 1994, § 440.

Amendments. The 2005 amendment, in (b), substituted "judge shall" for "judge, in his discretion, may," inserted "or she" and substituted "against the defendant" for "against the sentence."

Cross References. Deduction of confinement under prior conviction, ARCrP 36.15.

CASE NOTES

Analysis

Constitutionality.
Commencement of sentence.
Credit of pretrial jail time.
Discretion of court.

Constitutionality.

Disparity resulting from determining "good-time" towards credit and minimum parole eligibility time among various prisoners does not deny equal protection under U.S. Const., Amend. 14. West v. State, 257 Ark. 582, 518 S.W.2d 497 (1975).

Commencement of Sentence.

Where the defendant was convicted and sentenced for two offenses in state court, but before he was confined, he was tried on a deferral charge and imprisoned in a federal penitentiary, his state sentence started running on the date he was delivered to the state penitentiary to start serving his sentence. Young v. State, 252 Ark. 184, 477 S.W.2d 823 (1972).

Credit of Pretrial Jail Time.

Where record failed to show that the court did not afford to petitioner the opportunity to ask for credit for his jail time prior to sentencing, or that any objection was ever offered to the pronouncement of the sentence without crediting the pretrial jail time against the term imposed by the jury, circuit court properly denied the credit for time spent in pretrial incarceration. Coleman v. State, 257 Ark. 538, 518 S.W.2d 487 (1975).

Even if defendant were otherwise entitled to credit for the time he was held in custody, there is simply no way to credit this time against a life sentence; life less five years is a period not susceptible of prognostication. Campbell v. State, 265 Ark. 77, 576 S.W.2d 938 (1979).

A prisoner may receive jail time credit for time he has spent at his residence with his liberties restricted. Garrett v. McDonagh, 303 Ark. 348, 796 S.W.2d 582 (1990).

Discretion of Court.

It was not a violation of U.S. Const., Amend. 14, to deny credit for presentence confinement where no indigency was al-

leged and where accused was held on presumption of guilt for a nonbailable offense. Smith v. State, 256 Ark. 425, 508 S.W.2d 54 (1974).

Court has discretion on whether to count time spent by defendant in county jail awaiting trial and it did not abuse that discretion by refusing to count that time unless defendant showed that he failed to make bond because of indigency. Charles v. State, 256 Ark. 690, 510 S.W.2d 68 (1974).

This section does not direct or permit a judge to make the sentence effective retroactively to a pretrial incarceration. West v. State, 257 Ark. 582, 518 S.W.2d 497 (1975).

Where defendant was not given the right of allocution, the Arkansas Supreme Court could not indulge in the presumption that the trial court did its duty according to law or exercised its discretion pursuant to this section. Smith v. State, 257 Ark. 781, 520 S.W.2d 301 (1975).

This section vests discretion in the trial judge to decide whether credit for "jail time" should be given. Barnes v. State, 258 Ark. 565, 528 S.W.2d 370 (1975).

Cited: Smith v. State, 256 Ark. 425, 508 S.W.2d 54 (1974); Standridge v. State, 290 Ark. 150, 717 S.W.2d 795 (1986).

16-93-611. Class Y felonies.

(a)(1) Notwithstanding any law allowing the award of meritorious good time or any other law to the contrary, any person who is found guilty of or pleads guilty or nolo contendere to subdivisions (a)(1)(A)-(G) of this section shall not be eligible for parole or community punishment transfer, except as provided in subdivision (a)(3) or subsection (c) of this section, until the person serves seventy percent (70%) of the term of imprisonment to which the person is sentenced, including a sentence prescribed under § 5-4-501:

(A) Murder in the first degree, § 5-10-102;

(B) Kidnapping, Class Y felony, § 5-11-102;

(C) Aggravated robbery, § 5-12-103;

(D) Rape, § 5-14-103;

(E) Causing a catastrophe, § 5-38-202(a);

(F) Manufacture of methamphetamine, § 5-64-401(a)(1); or

(G) Possession of drug paraphernalia with the intent to manufacture methamphetamine, § 5-64-403(c)(5).

(2)(A) The seventy percent (70%) provision of subdivision (a)(1) of this section has no application to any person who is found guilty of or pleads guilty or nolo contendere to kidnapping, Class B felony, § 5-11-102, regardless of the date of the offense.

(B) The provisions of this section shall apply retroactively to all persons presently serving a sentence for kidnapping, Class B felony, § 5-11-102.

(3)(A)(i) For offenses committed on or after August 12, 2005, the seventy-percent provision under subdivision (a)(1) of this section shall include credit for the award of meritorious good time under § 12-29-201 to any person who is found guilty of or pleads guilty or nolo contendere to manufacture of methamphetamine under § 5-64-401(a)(1) or possession of drug paraphernalia with the intent to manufacture methamphetamine under § 5-64-403(c)(5).

(ii) For offenses committed on or after August 12, 2005, the seventy-percent provision under subdivision (a)(1) of this section may

include credit for the award of meritorious good time under § 12-29-202 to any person who is found guilty of or pleads guilty or nolo contendere to manufacture of methamphetamine under § 5-64-401(a)(1) or possession of drug paraphernalia with the intent to manufacture methamphetamine under § 5-64-403(c)(5), unless the person is sentenced to a term of life imprisonment.

(B) In no event shall the time served by any person who is found guilty of or pleads guilty or nolo contendere to manufacture of methamphetamine under § 5-64-401(a)(1) or possession of drug paraphernalia with the intent to manufacture methamphetamine under § 5-64-403(c)(5) be reduced to less than fifty percent (50%) of the person's original sentence.

(b) A jury may be instructed pursuant to § 16-97-103 regarding the awarding of meritorious good time under subdivision (a)(3) of this section.

(c) The sentencing judge, in his or her discretion, may waive subsection (a) of this section under the following circumstances:

(1) The defendant was a juvenile at the time of the offense;

(2) The juvenile was merely an accomplice to the offense; and

(3) The offense occurred on or after July 28, 1995.

(d) In no event shall the awarding of meritorious good time under § 12-29-201 or § 12-29-202 be applicable to persons sentenced under subdivisions (a)(1)(A)-(E) of this section.

History. Acts 1995, No. 1326, § 1; 1997, No. 945, § 1; 1997, No. 1197, § 2; 1999, No. 717, § 1; 1999, No. 1268, § 4; 1999, No. 1337, § 1; 2005, No. 1034, § 1.

A.C.R.C. Notes. Acts 1995, No. 1326, § 2, provided: "This act shall apply to offenses committed on or after the effective date of this act [July 28, 1995]."

Acts 1999, No. 1268, § 6, which was codified as § 29-30-163, provided: "The provisions of this act shall expire on April 30, 2002." Acts 2001, No. 1782, § 3 subsequently repealed § 29-30-163.

Publisher's Notes. Acts 1999, No. 1268, § 1, provided: "This act shall be known as the "Arkansas Methamphetamine Lab Act of 1999".

Acts 1999, No. 1268, § 7, provided: "The Arkansas Sentencing Commission shall report to the General Assembly regarding the impact of this act and shall make recommendations deemed appropriate as to the continuance of is provisions."

Amendments. The 2005 amendment substituted "subdivision (a)(3) or subsection (c)" for "subsection (b)" in (a)(1); inserted (a)(3), present (b), and (d); and redesignated former (b) as present (c).

CASE NOTES

Applicability.

There was no language in this section that expressly reflected the General Assembly's intent to make the statute apply retroactively; thus, defendant's request for a waiver from his sentence under former version of this section mandating he serve 70 percent of his sentence before becoming eligible for parole was properly denied. Edwards v. State, 347 Ark. 364, 64 S.W.3d 706 (2002).

Although the application of the 70 percent parole-eligibility rule to defendant's sentence for manufacture of methamphetamine, a 1998 offense, would have been an ex post facto law in violation of the federal and state constitutions, since, at the time of defendant's offense, this section did not include manufacture of methamphetamine and defense counsel never raised an objection at trial, defendant's case did not come within the scope of any of the

recognized exceptions to the contemporaneous objection rule and Arkansas did not adhere to the "plain error" rule; thus, defendant's argument was not preserved for review. McGhee v. State, 82 Ark. App. 105, 112 S.W.3d 367 (2003).

Cited: Propst v. State, 335 Ark. 448, 983 S.W.2d 405 (1998).

Subchapter 7 — Parole — Grant or Revocation Generally

SECTION.
16-93-701. Grant — Authority and procedures generally.
16-93-702. Grant — Required recommendations.
16-93-703. Grant — Place of hearings.
16-93-704. Grant — Notice to law enforcement personnel and committing court.
16-93-705. Revocation — Return of parole violator — Hearings.
16-93-706. Revocation — Powers of officials and circuit courts — Penalties.
16-93-707. [Repealed.]
16-93-708. Home detention.
16-93-709. Sex offender may not reside with minors.

Publisher's Notes. The State Board of Pardons and Paroles was abolished by Acts 1989, No. 937, § 1 and its powers and duties transferred to the State Board of Parole and Community Rehabilitation.

Acts 2005, No. 1033, § 2, provided: "The Arkansas Code Revision Commission shall replace 'Post Prison Transfer Board' in all sections of the Arkansas Code with 'Parole Board'." References to "Board of Pardons and Paroles" has also been changed to "Parole Board".

Effective Dates. Acts 1968 (1st Ex. Sess.), No. 50, § 46: Mar. 1, 1968. Emergency clause provided: "The General Assembly finds that the penal system of the State of Arkansas is in need of immediate reform, in order to better effectuate the rehabilitation of persons convicted of crime and to make possible their return as useful members of the community, and that the immediate passage of this Act is necessary to establish a Department of Correction to effectuate such rehabilitation. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after March 1, 1968."

Acts 1971, No. 33, § 4: Feb. 3, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to provide for proper law enforcement and for proper supervision of individuals paroled from the State Penitentiary, it is essential that the appropriate law enforcement officials of each county to which a person is paroled be given notice of such parole by the Parole Board, and that the immediate passage of this Act is necessary to require that said notice be given and to protect the public peace, health and safety. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 735, § 6: Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the Seventieth General Assembly that the Board of Pardons and Paroles lack the power to issue oaths and subpoena witnesses to testify or appear before the Board thereby preventing them from carrying out their assigned responsibilities with respect to parole revocation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 8, § 3: Feb. 1, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the State Parole Board should not grant paroles to convicted felons prior to receiving recommendations from the committing court, prosecuting attorney, the sheriff and the victims of the crime or

their next of kin; that present law does not require such procedure to be utilized by the Parole Board except in cases of capital murder, Class A felonies or Class B felonies; that this Act is necessary to expand the present law to include all felons, and that there is no justification in delaying the effective date of this Act. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 525, § 4: Mar. 17, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that parole hearings are now held, at least in some instances, at the State Prison; that this results in undue hardship and intimidation of the victims and relatives of victims who appear at such parole hearings; that this Act would prohibit parole hearings from being held at the State Prison and is immediately necessary to protect the victims of crime. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 771, § 3: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that Section 31 of Act 50 of 1968 (1st Ex. Sess.) (Ark. Stat. Ann. 43-2810) needs immediate amending in order to comply with guidelines and procedures set out by the United States Supreme Court for the return of parole violators. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety, shall be in full force and effect after its passage and approval."

Acts 1985, No. 269, § 4: Mar. 6, 1985; 1985, No. 917, § 4: Apr. 15, 1985. Emergency clauses provided: "It is hereby found and determined by the General Assembly that while present law requires all victims or their next of kin be notified by the Board of Pardons and Parole of a parole hearing for an inmate confined for commission of Class Y, A, or B felonies, there are victims or their families who wish to put the ugly past behind them, to forget forever the criminal offense perpetrated against them; that the present law does not have a mechanism to allow these persons to make their wishes known; that there will be trials immediately after the passage of this Act but before the effective date of this Act; that the victims of offenses tried during that interim period will be denied the privilege allowed in this Act and will suffer psychological trauma and disturbances by letting their wishes be known to the prosecuting attorney at the time of commitment of the inmates. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 1188, § 6: Apr. 8, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the physical and psychological health of our children is one of our most compelling interests. Furthermore, taking responsible measures to protect our children from persons who have sexually victimized them will significantly decrease the possibility of recurrences. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 1262, § 18: Jan. 1, 1998.

RESEARCH REFERENCES

ALR. Hearsay evidence: Admissibility at revocation hearings. 11 ALR 4th 999.

Power of court to revoke or modify probation for violations committed during the probation term. 13 ALR 4th 1240.

Revocation: Acts committed after impo-

sition of sentence but prior to commencement of probation term. 22 ALR 4th 755.

Increased sentence following revocation. 23 ALR 4th 883.

16-93-701. Grant — Authority and procedures generally.

(a)(1) The Parole Board may release on parole any individual eligible under the provisions of § 16-93-601 who is confined in any correctional institution administered by the Department of Correction, when in its opinion there is a reasonable probability that the prisoner can be released without detriment to the community or himself or herself.

(2) All paroles shall issue upon order, duly adopted, of the board.

(b)(1) Before ordering the release of any prisoner, the prisoner shall be interviewed by the board or a panel designated by the board.

(2)(A) The parole shall be ordered only for the best interest of society and not as an award for clemency.

(B) The parole shall not be considered as a reduction of sentence or a pardon.

(3) A prisoner shall be placed on parole only when the board believes that he or she is able and willing to fulfill the obligations of a law-abiding citizen.

(4) Every prisoner, while on parole, shall remain in the legal custody of the institution from which he was released, but shall be subject to the orders of the board.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 29; A.S.A. 1947, § 43-2808; Acts 1989, No. 937, § 6.

CASE NOTES

Analysis

Liberty interest.
Possibility of parole.

Liberty Interest.

For discussion of criteria which give rise to a protected liberty interest in parole, see Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

This section does not produce a liberty interest. Pittman v. Gaines, 905 F.2d 199 (8th Cir. 1990).

Possibility of Parole.

While the possibility of parole is established by this section, there is nothing further established than a mere possibility; nothing in this section creates a right of an inmate to release on parole which would invoke due process protection. Robinson v. Mabry, 476 F. Supp. 1022 (E.D. Ark. 1979).

By committing a felony while incarcerated, a prisoner increases the portion of his original sentence which he must serve before he is again eligible for parole. Garner v. Howell, 840 F.2d 616 (8th Cir. 1988).

Cited: Tabor v. State, 246 Ark. 983, 440 S.W.2d 536 (1969); Smith v. State, 1 Ark. App. 241, 614 S.W.2d 527 (1981); Schwindlig v. Smith, 596 F. Supp. 224 (E.D. Ark. 1984); Cherry v. State, 302 Ark. 462, 791 S.W.2d 354 (1990).

16-93-702. Grant — Required recommendations.

(a) Before the Parole Board shall grant any parole, the board shall solicit the written or oral recommendations of the committing court, the

prosecuting attorney, and the sheriff of the county from which the inmate was committed.

(b) If the person whose parole is being considered by the board was convicted of capital murder, § 5-10-101, or of a Class Y, Class A, or Class B felony, or any violent or sexual offense, the board shall also notify the victim of the crime, or the victim's next of kin, of the parole hearing and shall solicit written or oral recommendations of the victim or the victim's next of kin regarding the granting of the parole, unless the prosecuting attorney has notified the board at the time of commitment of the prisoner that the victim or the victim's next of kin does not want to be notified of future parole hearings.

(c) The board shall retain a copy of the recommendations in the board's file.

(d) The recommendations shall not be binding upon the board in the granting of any parole, but shall be maintained in a file which shall be open to the public during reasonable business hours.

(e) When soliciting recommendations from a victim of a crime, the board shall notify the victim or the victim's next of kin of the date, time, and place of the parole hearing.

History. Acts 1969, No. 153, § 1; 1981, No. 530, § 1; 1983, No. 8, § 1; 1983, No. 246, § 1; 1985, No. 269, § 1; 1985, No. 917, § 1; A.S.A. 1947, § 43-2819; Acts 1997, No. 1262, § 17.

A.C.R.C. Notes. Acts 1997, No. 1262, § 2, codified as § 16-90-1102, provided: "Failure to comply with this act does not create a claim for damages against a government employee, official, or entity."

Acts 1997, No. 1262, § 15, codified as § 16-90-1115, provided: "None of the provisions of this act shall be deemed to relieve any person of the duty of providing information or notices required by any other law."

Cross References. Victim notification system, § 12-12-1201 et seq.

RESEARCH REFERENCES

UALR L.J. Legislation of the 1983 General Assembly, Criminal Law, 6 UALR L.J. 613.

CASE NOTES

Cited: Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984).

16-93-703. Grant — Place of hearings.

(a) The Parole Board shall not schedule parole hearings at which victims or relatives of victims of crime are invited to appear at a facility wherein inmates are housed other than the Central Administration Building of the Department of Correction at Pine Bluff.

(b) Nothing in this section shall be construed as prohibiting the board from conducting parole hearings in two (2) sessions, one (1) at the place of the inmate's incarceration for interviews with the inmate, the inmate's witnesses, and correctional personnel, and the second session

for victims and relatives of victims as set out in subsection (a) of this section.

History. Acts 1983, No. 525, §§ 1, 2; A.S.A. 1947, §§ 43-2819.1, 43-2819.2.

16-93-704. Grant — Notice to law enforcement personnel and committing court.

(a) At the time that any person is paroled by the Parole Board, the board shall give written notice of the granting of the parole to the sheriff, the committing court, and the chief of police of all cities of the first class of the county from which the person was sentenced.

(b) If the person is paroled to a county other than that from which he or she was committed, the board shall give notice to the chief of police or marshal of the city to which he or she is paroled, to the chief of police of all cities of the first class and the sheriff of the county to which he or she is paroled, and to the sheriff of the county from which the person was committed.

History. Acts 1969, No. 153, § 2; 1971, No. 33, § 1; A.S.A. 1947, § 43-2820.

16-93-705. Revocation — Return of parole violator — Hearings.

(a)(1) At any time during a parolee's release on parole, the Parole Board may issue a warrant for the arrest of the parolee for violation of any conditions of parole or may issue a notice to appear to answer a charge of a violation.

(2) The warrant or notice shall be served personally upon the individual.

(3) The warrant shall authorize all officers named in the warrant to place the parolee in custody at any suitable detention facility pending a hearing.

(4) Any parole officer may arrest a parolee without a warrant or may deputize any officer with power of arrest to do so by giving him or her a written statement setting forth that the parolee, in the judgment of the parole officer, violated conditions of his or her parole.

(5) The written statement delivered with the parolee by the arresting officer to the official in charge of the detention facility to which the parolee is brought shall be sufficient warrant for detaining him or her pending disposition.

(6) If the board or its designee finds, by a preponderance of the evidence, that the parolee has inexcusably failed to comply with a condition of his or her parole, the parole may be revoked at any time prior to the expiration of the period of parole.

(7) A parolee for whose return a warrant has been issued by the board shall be deemed a fugitive from justice if it is found that the warrant cannot be served.

(8) The board shall determine whether the time from the issuance of the warrant to the date of arrest, or any part of it, shall be counted as time served under the sentence.

(b)(1) A parolee arrested for violation of parole shall be entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he or she has violated a condition of parole.

(2) The hearing shall be conducted by the parole hearing examiner for the board as soon as practical after arrest and reasonably near the place of the alleged violation or arrest.

(3) The parolee shall be given prior notice of the date, time, and location of the hearing, the purpose of the hearing, and the conditions of parole he or she is alleged to have violated.

(4) Except as provided in subsection (d) of this section, the parolee shall have the right to hear and controvert evidence against him or her, to offer evidence in his or her own behalf, and to be represented by counsel.

(5) If the hearing examiner finds that there is reasonable cause to believe that the parolee has violated a condition of parole, the hearing examiner may order the parolee returned to the custody of the Department of Correction for a revocation hearing before the board.

(6) If the hearing examiner does not find reasonable cause, he or she shall order the parolee released from custody, but that action shall not bar the board from holding a hearing on the alleged violation of parole or from ordering the parolee to appear before it.

(7) The hearing examiner shall prepare and furnish to the board and the parolee a summary of the hearing, including the substance of the evidence and testimony considered.

(c)(1) A parole shall not be revoked except after a revocation hearing, which shall be conducted by the board or its designee within a reasonable period of time after the parolee's arrest.

(2) The parolee shall be given prior notice of the date, time, and location of the hearing, the purpose of the hearing, and the conditions of parole he or she is alleged to have violated.

(3) Except as provided in subsection (d) of this section, the parolee shall have the right to hear and controvert evidence against him or her, to offer evidence in his or her own defense, and to be represented by counsel.

(4) If parole is revoked, the board or its designee shall prepare and furnish to the parolee a written statement of evidence relied on and the reasons for revoking parole.

(d) At a preliminary hearing pursuant to subsection (b) of this section or a revocation hearing pursuant to subsection (c) of this section:

(1) The parolee shall have the right to confront and cross-examine adverse witnesses unless the hearing examiner or the board or its designee specifically finds good cause for not allowing confrontation; and

(2) The parolee may introduce any relevant evidence of the alleged violation, including letters, affidavits, and other documentary evidence,

regardless of its admissibility under the rules governing the admission of evidence.

(e) A preliminary hearing pursuant to subsection (b) of this section shall not be required if:

(1) The parolee waives a preliminary hearing; or

(2) The revocation hearing pursuant to subsection (c) of this section is held promptly after the arrest and reasonably near the place where the alleged violation occurred or where the parolee was arrested.

(f) A preliminary hearing pursuant to subsection (b) of this section and a revocation hearing pursuant to subsection (c) of this section shall not be necessary if the revocation is based on the parolee's conviction, guilty plea, or plea of nolo contendere to a felony offense for which he or she is sentenced to the Department of Correction or to any other state or federal penal institution.

History. Acts 1968 (1st Ex. Sess.), No. 50, § 31; 1983, No. 771, § 1; A.S.A. 1947, § 43-2810.

CASE NOTES

Analysis

Assistance in making arrest.
Sufficiency of evidence.
Warrantless arrest.

Assistance in Making Arrest.

A parole officer may recruit the assistance of a city policeman or a state policeman, or any other officer authorized to make arrests, to assist him in performing his duty to make an arrest. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977).

Sufficiency of Evidence.

Evidence that is insufficient to support a criminal conviction may be sufficient to support a probation revocation. Billings v. State, 53 Ark. App. 219, 921 S.W.2d 607 (1996).

Warrantless Arrest.

An arrest without a warrant in a private dwelling may be made at night as well as during daylight hours. Giles v. State, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180 (1977).

Defendant's arrest without a warrant was not illegal since § 16-93-705 allows summary arrest for violation of parole, and such arrest is not unconstitutional since this section provides that a parolee remains in the legal custody of the institution from which he is released. Smith v. State, 1 Ark. App. 241, 614 S.W.2d 527 (1981).

Although there was no written statement from defendant's parole officer to arrest defendant as required by this section, the appellate court upheld the arrest because it was otherwise supported by probable cause. Medlock v. State, 79 Ark. App. 447, 89 S.W.3d 357 (2002).

16-93-706. Revocation — Powers of officials and circuit courts — Penalties.

(a)(1) The Chair of the Parole Board or his or her designee, the hearing officer presiding over any preliminary hearing with respect to an alleged parole violation, the administrator of the board, or any member of the board pursuant to the authority of the board to meet and determine whether to revoke parole shall have the power to issue oaths and to subpoena witnesses to appear and testify and bring before the

hearing officer or the board any relevant books, papers, records, or documents.

(2) The subpoena shall be directed to any sheriff, coroner, or constable of any county where the designated witness resides or is found. The endorsed affidavit on the subpoena of any person of full age shall be proof of the service, which shall be served and returned in the same manner as subpoenas in civil actions in the circuit courts are served and returned.

(b) The fees and mileage expenses as prescribed by law for witnesses in civil cases shall be paid by the Department of Correction.

(c)(1) In case of failure or refusal by any person to comply with a subpoena issued under this section to testify or answer to any matter regarding which the person may be lawfully interrogated, any circuit court in this state, on application of the hearing officer or the chair, shall, in term or vacation, issue an attachment for the person and compel him or her to comply with the subpoena and appear before the hearing officer or the board and to produce any testimony and documents as may be required.

(2) The circuit court shall have the power to punish any contempt, in case of disobedience, as in civil cases, or it shall be a misdemeanor for a witness to refuse or neglect to appear and testify, punishable upon conviction by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500).

(d) Any person willfully testifying falsely under oath before the board or at a preliminary hearing in which probable cause for parole revocation is to be considered as to any matter material to a lawful inquiry by the board or hearing officer may be charged with perjury and upon conviction punished accordingly.

History. Acts 1975, No. 735, §§ 1-4; A.S.A. 1947, §§ 43-2824 — 43-2827.

16-93-707. [Repealed.]

Publisher's Notes. This section, concerning notice of future parole hearings to victim or victim's next of kin, was repealed by Acts 1997, No. 1262, § 22, effective January 1, 1998. The section was derived from Acts 1985, No. 269, § 2; 1985, No. 917, § 2; A.S.A. 1947, § 43-2819.3; Acts 1997, No. 1112.

Pursuant to § 1-2-207, the amendment of this section by Acts 1997, No. 1112, was superseded by the repeal of this section by Acts 1997, No. 1262.

16-93-708. Home detention.

(a) "Approved electronic monitoring or supervising device" means any electronic device approved by the Board of Corrections which meets the minimum Federal Communications Commission regulations and requirements, and which is limited in capability to recording or transmitting information as to the criminal defendant's presence in the home.

(b)(1)(A) Subject to the provisions of subdivision (b)(2) of this section, a defendant convicted of a felony or misdemeanor and sentenced to imprisonment may be incarcerated in a home detention program when:

(i) In the independent opinions of a prison physician and a consultant physician from the community, a person who is incarcerated in the Department of Correction or Department of Community Correction has an incurable illness which on the average will result in death within twelve (12) months; or

(ii) A person who is incarcerated in the Department of Correction or Department of Community Correction is permanently physically or mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or setting providing a similar level of care.

(B) The Director of the Department of Correction or the Director of the Department of Community Correction shall make the facts described in subdivision (b)(1)(A) of this section known to the Parole Board for consideration of early release to home detention.

(2) The Board of Corrections shall promulgate rules that will establish policy and procedures for incarceration in a home detention program.

(c)(1) In all instances where the department may release any inmate to community supervision, in addition to all other conditions which may be imposed by the department, the department may require the criminal defendant to participate in a home detention program.

(2)(A) The term of the home detention shall not exceed the maximum number of years of imprisonment or supervision to which the inmate could be sentenced.

(B) The length of time the defendant participates in a home detention program and any good-time credit awarded shall be credited against the defendant's sentence.

(d) The Board of Corrections shall establish policy and procedures for participation in a home detention program, including, but not limited to, program criteria, terms, and conditions of release.

History. Acts 1991, No. 263, §§ 1-3; 1991, No. 307, §§ 1-3; 2005, No. 680, § 3.

Amendments. The 2005 amendment substituted "Board of Corrections" for "board of correction" in (a); inserted present (b); redesignated former (b) and (c) as present (c) and (d); and substituted "Corrections" for "Correction" in present (d).

RESEARCH REFERENCES

ALR. Validity of condition of probation, supervised release, or parole restricting computer use or internet access. 4 A.L.R.6th 1.

CASE NOTES

Cited: Bush v. State, 338 Ark. 772, 2 S.W.3d 761 (1999).

16-93-709. Sex offender may not reside with minors.

(a) Whenever an inmate in a facility of the Department of Correction who has been found guilty of or has pleaded guilty or nolo contendere to any sexual offense defined in § 5-14-101 et seq., or incest as defined by § 5-26-202, and the sexual offense or incest was perpetrated against a minor, becomes eligible for parole and makes application for release on parole, the Parole Board shall prohibit, as a condition of granting the parole, the parolee from residing upon parole in a residence with any minor, unless the board makes a specific finding that the inmate poses no danger to the minors residing in the residence.

(b) If the board, upon a hearing pursuant to § 16-93-705, finds, by a preponderance of the evidence, that the parolee has failed to comply with this condition of parole, the parole may be revoked and the parolee returned to the custody of the department.

History. Acts 1997, No. 1188, § 2.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this section which was enacted subsequently.

Subchapter 8 — Parole — Work-Release

SECTION.
16-93-801 — 16-93-806. [Repealed.]

16-93-801 — 16-93-806. [Repealed.]

Publisher's Notes. This subchapter was repealed by Acts 1993, Nos. 532 and 550, § 9. The subchapter was derived from the following sources:

16-93-801. Acts 1983, No. 230, § 7; 1985, No. 1071, § 2; A.S.A. 1947, § 43-2841; Acts 1987, No. 904, § 3.

16-93-802. Acts 1983, No. 230, § 8; A.S.A. 1947, § 43-2842.

16-93-803. Acts 1983, No. 230, §§ 1-3; 1985, No. 1071, § 1; A.S.A. 1947, §§ 43-2835 — 43-2837; Acts 1987, No. 904, § 1; 1989, No. 434, § 1; 1991, No. 583, § 1.

16-93-804. Acts 1983, No. 230, § 4; A.S.A. 1947, § 43-2838; Acts 1987, No. 904, § 2.

16-93-805. Acts 1983, No. 230, § 5; A.S.A. 1947, § 43-2839.

16-93-806. Acts 1983, No. 230, § 6; A.S.A. 1947, § 43-2840.

For present law, see § 16-93-1201 et seq.

Subchapter 9 — Uniform Act for Out-of-State Parolee Supervision

SECTION.
16-93-901 — 16-93-903. [Repealed.]

16-93-901 — 16-93-903. [Repealed.]

Publisher's Notes. This subchapter, concerning out-of-state parolee supervision, was repealed by Acts 2001, No. 253, § 1. The subchapter was derived from the following sources:

16-93-901. Acts 1937, No. 172, § 1; Pope's Dig., § 5400; A.S.A. 1947, § 43-2816.

16-93-902. Acts 1937, No. 172, § 2; A.S.A. 1947, § 43-2817n.

16-93-903. Acts 1937, No. 172, § 3; Pope's Dig., § 5402; A.S.A. 1947, § 43-2817.

Subchapter 10 — Community Service Work — Acts 1989, No. 957

SECTION.
16-93-1001. Purpose.
16-93-1002. Definitions.
16-93-1003. Provisions supplemental.
16-93-1004. Procedure — Medical and legal costs.

A.C.R.C. Notes. Acts 1989, Nos. 613 and 957, enacted different provisions relating to community service work. Acts 1989, No. 957, is codified as this subchapter, and Acts 1989, No. 613, is codified as § 16-93-1101 et seq.

Effective Dates. Acts 1991, No. 545, § 6: Mar. 14, 1991. Emergency clause provided: "It is hereby found by the General Assembly that work release programs are not being utilized due to county and city officials' concerns over legal liability and medical costs for inmates who may be placed in these programs. It is further found by the General Assembly of the State of Arkansas that work release programs where persons convicted of felonies and/or misdemeanors are put to work for the community's benefit are in the best interest of the State and of the inmates so diverted from the Arkansas Department of Corrections and that provisions should be made for their medical treatment and for any legal liability costs that arise and that passage of this Act will remedy this problem. It is further stated that work release programs are necessary to relieve prison congestion in this State and to allow non-violent offenders to pay back society for the costs of their crimes through public service. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12 UALR L.J 617.

16-93-1001. Purpose.

(a) The congested prison system has resulted in a number of changes within the criminal justice system that do not appear readily to the public eye. One major problem is that we have lost an interim sentencing alternative between placing a person on probation or a suspended sentence or sending that person to the prison system. This gap was filled in the past by incarcerating a person who received a felony suspended sentence which included, as a condition of the

sentence, a period of incarceration in a local detention facility or incarcerating a person who received a misdemeanor sentence of up to one (1) year in such a facility. As the prison system backlog inundated county detention facilities, those spaces were no longer available for these types of sentences. A result of the insufficient bedspace in county detention facilities has been that more people are actually being sent to the prison system in cases where incarceration in county detention facilities is a viable alternative punishment.

(b) This subchapter will help bridge the gap that has been created. There are incentives for all facets of society. First, although the person sentenced will be incarcerated, he or she does have an opportunity to "work" his or her way out of being housed in the prison system. Also, the good time incentive allows the prisoner to reduce his or her period of incarceration, not only benefiting him or her, but also making it conducive for sheriffs to implement work projects and free up their jail space for more violent offenders. Budgetary cutbacks over the past five (5) years, for example, in revenue sharing funds from the federal government, have resulted in many community projects being neglected. An easy example is the clean-up of our cities, towns, and highways of litter and debris. From the public's standpoint, this subchapter would most importantly provide a mechanism for providing these valuable services to the public at a minimal cost. It is believed that the public will approve of the use of manual labor by persons as a just punishment.

History. Acts 1989, No. 957, § 1.

16-93-1002. Definitions.

As used in this subchapter:

(1) "Community work project" means any program in which county jail inmates are allowed to work under the supervision of governmental agencies on projects on public lands, buildings, roads, parks, and public rights-of-way designed to benefit the governmental unit employing the inmates;

(2) "Eligible offender" means any person convicted of a misdemeanor offense or felony offense other than a capital felony offense, murder in the first degree, murder in the second degree, rape, kidnapping, aggravated robbery, driving while intoxicated, negligent homicide, or the delivery, possession with intent to deliver, or manufacture of any controlled substance in violation of the Uniform Controlled Substances Act, § 5-64-101 et. seq.; and

(3) "Work incentive credit" means that an inmate who voluntarily agrees to be sentenced under the appropriate provisions of this subchapter, and successfully performs such services, shall be entitled to receive up to three (3) days credit as designated by the sentencing court toward completion of the inmate's sentence for each day of such service performed.

History. Acts 1989, No. 957, § 2.

16-93-1003. Provisions supplemental.

This subchapter is supplemental to other alternative sentencing laws and nothing in this subchapter shall repeal any provision of any law providing for alternative sentencing nor shall this subchapter repeal any act passed during the 1989 Regular Session of the General Assembly relating to alternative sentencing.

History. Acts 1989, No. 957, § 6.

16-93-1004. Procedure — Medical and legal costs.

(a) Any consenting eligible offender who is convicted of a felony or misdemeanor or who enters a plea of guilty or nolo contendere to a felony or misdemeanor may upon recommendation of the prosecuting attorney be sentenced under this subchapter.

(b) The sentencing court may suspend imposition of the offender's sentence for a period not to exceed the period of years that is the maximum penalty for the offense for which convicted upon condition that the defendant be incarcerated in a county detention facility to participate in a community work project. In order for the defendant to participate in this program, space must be available in the county detention facility as certified by the county sheriff to the Department of Correction. The length of such community work project service and incarceration shall not exceed eighteen (18) months on a felony with work incentive credit or, in the case of a misdemeanor, the maximum length of incarceration provided for the misdemeanor reduced by the work incentive credit.

(c) In the event that during an offender's service under a community work project sentence pursuant to this subchapter, the offender withdraws his or her consent to participate in the project, the sentencing court shall have the offender brought before the court within a reasonable time after receiving such notice from either the sheriff of the county wherein the inmate is incarcerated or the prosecuting attorney of that county and make inquiries of the offender to determine whether or not consent to proceed under the program is being withdrawn. In the event that the court finds that the offender is withdrawing consent to participate in the community work project, the court shall remand the offender to the department if the offense was a felony or, in the case of a misdemeanor, to the sheriff of the county wherein the offense was committed, to serve the remaining portion of the offender's sentence. The offender shall be entitled to all good time and parole eligibility considerations as provided for by law. Any portion of the sentence which was suspended by the court at the time of the original sentence shall not be affected by the court's removal of an offender from participating in the community work project.

(d) In the event that the offender's conduct while participating in a community work project is unsatisfactory, the court may upon petition

filed by the prosecuting attorney schedule a hearing to determine if the offender should be allowed to continue to participate in the community work project. This hearing shall follow the same format and accord the offender the same safeguards as the revocation procedure as outlined in § 5-4-309. The burden of proof necessary for revocation of a sentence under this subchapter shall be a preponderance of the evidence that the offender's conduct has not been satisfactory while participating in a community work project. If the court determined that the offender's conduct has not been satisfactory, the court shall remand the offender to the department if the offense was a felony or, in the case of a misdemeanor, to the sheriff of the county wherein the offense was committed, to serve all or a part of the remaining portion of the offender's original sentence. The offender shall be entitled to all good time and parole eligibility considerations as provided for by law.

(e) Nothing in this subchapter shall grant any offender the right to be sentenced under these provisions as a matter of right.

(f) The state shall be responsible for the cost of medical treatment of an eligible offender sentenced pursuant to the felony provisions of this subchapter:

(1) That is the result of injuries sustained on the work site or during transportation to and from the work site by a governmental agency; or

(2) That is the result of illness or injuries sustained by persons committed to the county jail and who are assigned to a community work project. However, the department may transfer any inmate committed to jail pursuant to this subchapter to a medical or treatment facility it deems appropriate for the treatment.

(g) The state shall be responsible for any liability incurred as the result of implementation and execution of this subchapter involving persons sentenced as eligible offenders for felony offenses who, pursuant to this subchapter, may be injured while on a community work project or while being transported to or from a community work project by a governmental agency.

(h) The state shall reimburse the counties for housing inmates sentenced pursuant to the felony provisions of this subchapter at a rate to be determined by the Board of Corrections.

History. Acts 1989, No. 957, §§ 3, 4; 1991, No. 545, §§ 1, 2.

Subchapter 11 — Community Service Work — Acts 1989, No. 613

SECTION.
16-93-1101. Definitions.
16-93-1102. Procedure generally.
16-93-1103. Rules and regulations.
16-93-1104. Immunity from liability.
16-93-1105. Sentence optional.

A.C.R.C. Notes. Acts 1989, Nos. 613 and 957, enacted different provisions relating to community service work. Acts 1989, No. 613, is codified as this subchap-

ter, and Acts 1989, No. 957, is codified as § 16-93-1001 et seq.

Effective Dates. Acts 1989, No. 613, § 8: Mar. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that there continues to be a serious overcrowding in the Department of Correction facilities and that overcrowding is likely to continue unless appropriate action is taken immediately; that this Act is designed to establish a procedure for alleviating this problem and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 542, § 11: Mar. 14, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that a recent court decision has led to uncertainty in the area of immunity under existing Arkansas Code provisions; that to clarify such provisions will allow those persons to avoid needless legal expenses resulting from the possible misinterpretation of the law. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

UALR L.J. Survey, Criminal Law, 12 UALR L.J 617.

16-93-1101. Definitions.

As used in this subchapter:

(1) "Community work project" means any program in which county jail inmates are allowed to work under the supervision of governmental agencies on projects on public lands, buildings, roads, parks, and public rights-of-way designed to benefit the governmental unit utilizing the inmates;

(2) "Eligible offender" means any person convicted of a misdemeanor offense or felony offense other than a capital felony offense, murder in the first degree, murder in the second degree, rape, kidnapping, aggravated robbery, second or subsequent driving while intoxicated offenses, negligent homicide, or the delivery, possession with intent to deliver, or manufacture of any controlled substance in violation of the Arkansas Drug Abuse Control Act, § 20-64-301 et seq.; and

(3) "Work incentive credit" means that an inmate who voluntarily agrees to be sentenced under the appropriate provisions of this subchapter, and successfully performs such services, shall be entitled to receive one (1) day credit as designated by the sentencing court toward completion of the inmate's sentence for each day of such service performed.

History. Acts 1989, No. 613, § 1.

A.C.R.C. Notes. Acts 1989, Nos. 613 and 957, enacted different provisions relating to community service work. Acts 1989, No. 613, is codified as this subchapter, and Acts 1989, No. 957, is codified as § 16-93-1001 et seq.

16-93-1102. Procedure generally.

(a) Any consenting eligible offender who is convicted of a felony or misdemeanor, or who enters a plea of guilty or nolo contendere to a felony or misdemeanor, may upon recommendation of the court be sentenced under this subchapter.

(b) The sentencing court may suspend imposition of the offender's sentence for a period not to exceed the period of years that is the maximum penalty for the offense convicted upon condition that the defendant be either incarcerated in a county detention facility or, at the discretion of the court, reside at his or her principal residence under the supervision of a probation officer and participate in a community work project. The length of such community work project service and incarceration shall not exceed eighteen (18) months on a felony with work incentive credit or, in the case of a misdemeanor, the maximum length of incarceration provided for the misdemeanor reduced by the work incentive credit.

(c) In the event that during an offender's service under a community work project sentence pursuant to this subchapter, the offender withdraws his consent to participate in the project, the sentencing court shall have the offender brought before the court within a reasonable time after receiving such notice from either the sheriff of the county wherein the inmate is incarcerated or under probation, or the prosecuting attorney of that county, and the court shall make inquiries of the offender to determine whether or not consent to proceed under the program is being withdrawn. In the event that the court finds that the offender is withdrawing consent to participate in the community work project, the court shall remand the offender to the Department of Correction if the offense was a felony or, in the case of a misdemeanor, to the sheriff of the county wherein the offense was committed, to serve the remaining portion of the offender's sentence. The offender shall be entitled to all good time and parole eligibility considerations as provided for by law. Any portion of the sentence which was suspended by the court at the time of the original sentence shall not be affected by the court's removal of an offender from participating in the community work project.

(d) In the event that the offender's conduct while participating in a community work project is unsatisfactory, the court may upon petition filed by the prosecuting attorney schedule a hearing to determine if the offender should be allowed to continue to participate in the community work project. This hearing shall follow the same format and accord the offender the same safeguards as the revocation procedure as outlined in § 5-4-309. The burden of proof necessary for revocation of a sentence under this subchapter shall be a preponderance of the evidence that the offender's conduct has not been satisfactory while participating in a community work project. If the court determines that the offender's conduct has not been satisfactory, the court shall remand the offender to the department if the offense was a felony or, in the case of a misdemeanor, to the sheriff of the county wherein the offense was

committed, to serve all or part of the remaining portion of the offender's original sentence. The offender shall be entitled to all good time and parole eligibility considerations as provided for by law.

History. Acts 1989, No. 613, § 2.

16-93-1103. Rules and regulations.

The Board of Corrections shall promulgate necessary rules and regulations to be followed by governmental entities in the supervision of eligible offenders utilized under the provisions of this subchapter.

History. Acts 1989, No. 613, § 3.

16-93-1104. Immunity from liability.

All governmental agencies and units utilizing eligible offenders in community work projects shall be immune from liability and suit for damages, and no tort action shall lie against any governmental agency or unit because of the acts of eligible offenders utilized under the provisions of this subchapter.

History. Acts 1989, No. 613, § 4; 1991, No. 542, § 5.

16-93-1105. Sentence optional.

Nothing in this subchapter shall grant any offender the right to be sentenced under these provisions as a matter of right.

History. Acts 1989, No. 613, § 5.

Subchapter 12 — Community Punishment

SECTION.
16-93-1201. Findings and determinations.
16-93-1202. Definitions.
16-93-1203. Board of Corrections — Powers and duties.
16-93-1204. Authorization.
16-93-1205. Operation and supervision of community correction programs.
16-93-1206. Sentencing alternatives.
16-93-1207. Order of court.
16-93-1208. Post commitment transfer.
16-93-1209. Liability.
16-93-1210. Sentence optional.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1995, No. 577, § 6: Mar. 9, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that the inmate transfer provisions of Arkansas Code 16-93-206 and 1301 expire on April 1, 1995; that those provisions should continue in effect until April 1, 1997; that this act so provides; and that unless this act goes into effect immediately it will not be effective until after the expiration of those provisions. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation

of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 1170, § 13: Apr. 11, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion exists regarding the status of ineligible offenders judicially transferred to Department of Community Punishment facilities; that there is an immediate need to clarify the law applicable to transferring ineligible offenders back to the Department of Correction; and that it is in the best interest of the courts which already have crowded documents to immediately reduce the reporting requirements for departure sentences. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2005, No. 186, § 3: July 1, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the United States Supreme Court has held that the federal sentencing guidelines are unconstitutional; that the voluntary presumptive standards of the State of Arkansas may be challenged as unconstitutional; and that this act is immediately necessary in order to confirm that the sentencing guidelines, as originally enacted, are advisory. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2005."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Procedure, 16 UALR L.J. 99.

16-93-1201. Findings and determinations.

(a) The State of Arkansas hereby finds that the cost of incarcerating the ever-increasing numbers of offenders in traditional penitentiaries is skyrocketing, bringing added fiscal pressures on state government, and that some inmates can be effectively punished, with little risk to the public, in a more affordable manner through the use of community correction programs and nontraditional facilities.

(b) As a result of the rising cost of traditional incarceration, the state finds that the purpose of corrections in Arkansas is twofold:

(1) "Community correction", defined as both nontraditional correction centers and nonresidential community corrections, including supervision on probation, parole, and transfer, is charged with the provision of correction focused on promoting offender accountability and the supervision of offenders at appropriate levels to promote public safety; and

(2)(A) "Institutions", defined as traditional prison beds, are charged with the appropriate incapacitation of high risk offenders.

(B) "Incapacitation" involves traditional aspects of incarceration coupled with highly supervised community correction when appropriate.

(C) "High risk" is defined as those convicted of the most serious offenses, those who have longer criminal histories, and those who have repeatedly failed to comply with conditions imposed under less restrictive sanctions.

(c) Furthermore, the state determines that services designed to

address offender needs must be integrated into the framework of both institutions and community correction programs and must be balanced with supervision and correction such that the community is repaid for the offense, public safety is promoted through supervision, and the offender is assisted in becoming a law-abiding member of society.

History. Acts 1993, No. 531, § 1; 1993, No. 548, § 1; 2005, No. 1994, § 287.

Amendments. The 2005 amendment substituted "correction" for "punishment" throughout this section; and redesignated former (b)(1), (b)(1)(A) and (b)(1)(B) as present (b)(1)(A), (b)(1)(B) and (b)(1)(C).

16-93-1202. Definitions.

As used in this subchapter:

(1) "Board" means the Board of Corrections;

(2) "Community correction" means:

(A) Probation, a judicially imposed criminal sanction permitting varying levels of supervision of eligible offenders in the community;

(B) Economic sanctions programs, including an active organized collection of fees, fines, restitution, day fines, day reporting centers, and penalties attached for nonpayment of fines;

(C) Home detention programs, ranging from curfew programs to house arrest with and without electronic monitoring;

(D) Community service programs, including both supervised and unsupervised work assignments and projects such that offenders provide substantial labor benefit to the community;

(E) Work-release programs, including residential and nonresidential forms of labor, with salary, in the community;

(F) Restitution programs, an organized collection and dissemination of restitution by a designated entity within the community punishment range of services, including, when necessary, the use of restitution centers such that the offender is held accountable and the victim receives restitution ordered by the court in a timely fashion;

(G)(i) Community correction facilities, multipurpose facilities encompassing security, punishment, and services such that offenders can be housed therein when necessary but can also be assigned to or access correction programs and services which are housed there.

(ii) Included therein are revocation centers, restitution centers, work-release centers, and community correction centers;

(H) Boot camps, highly regimented programs encompassing strict discipline, education, treatment, and counseling designed to have the greatest positive impact on the offender in the shortest period of time;

(I) Drug and alcohol treatment services, including both inpatient and outpatient drug and alcohol abuse treatment and counseling provided by qualified community correction service provider programs for correctional clients;

(J) Educational programs, including programs focused on the acquisition of basic learning skills, general educational developmental preparation, literacy training, and other applicable areas of education that are of value to correctional clients;

(K) Vocational programs, focused on the learning of a marketable skill by correctional clients utilizing qualified vocational and technical community correction service provider programs whenever possible;

(L) Job skills programs, focused on the acquisition of basic job skills, especially those related to how to get a job and how to keep a job;

(M) Mental health treatment services, including both inpatient and outpatient mental health, family, and psychological counseling and treatment provided by qualified community correction service provider programs for correctional clients;

(N) Parole, an administrative condition permitting state supervision of eligible offenders sentenced to state correctional facilities and released therefrom to community correction programs or supervision;

(O) Post prison supervision, an administrative condition permitting state supervision of offenders sentenced to state correctional facilities and transferred from there to community correction programs or community supervision; and

(P) Pretrial programs, including the supervision and monitoring of certain defendants while awaiting sentencing or disposition by a court;

(3) "Community correction service provider program" means a public or private organization which provides treatment, guidance, training, support, or other rehabilitative services to individual offenders, offender groups, and their families in such areas as health, education, vocational training, special education, social services, psychological counseling, alcohol and drug treatment, and other applicable correctional concerns;

(4) "Department of Community Correction" means the administrative structure in place to oversee the development and operation of community correction facilities, programs, and services, including probation and parole supervision;

(5) "Department of Correction" means the administrative structure in place to oversee the daily operation of secure prison facilities;

(6) "Eligibility" or "eligible offender" means any person convicted of a felony who is by law eligible for such sentence and who falls within the population targeted by the General Assembly for inclusion in community correction facilities or who is otherwise under the supervision of the Department of Community Correction;

(7) "Incarceration" means commitment to the Department of Correction;

(8) "Supervision" means direct supervision at varying levels of intensity by either probation officers, in the case of sentences to probation with a condition of community correction, or parole and post prison supervision officers, in the case of offenders eligible for release on parole or offenders transferred to community correction or community supervision from the Department of Correction;

(9) "Suspended imposition of sentence" means a procedure whereby a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision.

(10)(A)(i) "Target group" means a group of offenders and offenses determined to be, but not limited to, theft, theft by receiving, hot

checks, residential burglary, commercial burglary, failure to appear, fraudulent use of credit cards, criminal mischief, breaking or entering, drug paraphernalia, driving while intoxicated, fourth or subsequent offense, all other Class C or Class D felonies which are not either violent or sexual and which meet the eligibility criteria determined by the General Assembly to have significant impact on the use of correctional resources, Class A and Class B controlled substance felonies, and all other unclassified felonies for which the prescribed limitations on a sentence do not exceed the prescribed limitations for a Class C felony and that are not either violent or sexual.

(ii) Offenders committing solicitation, attempt, or conspiracy of the substantive offenses listed above are also included in the group.

(iii) For the purposes of this subsection, "violent or sexual" includes all offenses against the person codified in § 5-10-101 et seq., § 5-11-101 et seq., § 5-12-101 et seq., § 5-13-201 et seq., § 5-13-301 et seq., and § 5-14-101 et seq., and any offense containing as an element of the offense the use of physical force, the threatened use of serious physical force, the infliction of physical harm, or the creation of a substantial risk of serious physical harm.

(B) Offenders and offenses falling within the target group population may access community correction facilities pursuant to § 16-93-1206 or § 16-93-1208;

(11) "Transfer" means an administrative condition permitting transfer of eligible offenders sentenced to traditional state correctional facilities to community correction facilities, programming, and community supervision, provided that only target offenders are eligible for the facilities;

(l2)(A) "Transfer date" means the earliest date on which an offender is eligible for transfer from the Department of Correction to the Department of Community Correction.

(B) The date may be extended based on disciplinary behavior while under the custody of the Department of Correction; and

(13) "Trial court" means any court of this state having jurisdiction of an eligible offender and the power to sentence the eligible offender to the included options.

History. Acts 1993, No. 531, § 3; 1993, No. 548, § 3; 1995, No. 577, § 1; 1997, No. 279, § 1; 1997, No. 945, § 2; 2001, No. 1255, § 1; 2003, No. 245, § 1; 2003, No. 1018, § 1; 2005, No. 1994, § 287.

Publisher's Notes. Acts 1993, No. 548, § 3, provided, in part:

"Community Punishment Target Group Table in Code Section Numerical Order

Code Section	Name of crime
5-36-401	Nonsupport
5-36-103	Theft of property (Class B, C, and D)
5-36-104	Theft of services (Class B and C)
5-36-105	Theft of property lost, mislaid, delivered by mistake
5-36-106	Theft by receiving (Class B and C)
5-36-115	Theft of leased or rented prop. (Class B and C)
5-37-201	Forgery (first and second degrees)

5-37-203	Defrauding secured creditors
5-37-204	Fraud in insolvency
5-37-207	Fraudulent use of a credit card
5-37-209	Criminal possession of forgery device
5-37-210	Obtaining signature by deception
5-37-211	Defrauding judgment creditors
5-37-212	Using slugs of $100 or more
5-37-213	Criminal simulation
5-37-302	Hot checks (Class B and C)
5-37-524	Fraud in acquisition of authority to provide motor vehicle transportation of property
5-37-525	Defrauding a materialman of $5000 or more
5-38-203	Criminal mischief I
5-38-204	Criminal mischief II
5-39-201	Commercial burglary
5-39-202	Breaking and entering
5-54-120	Failure to appear
5-56-102	Illegal use of food coupons
5-56-103	Illegal presentation of food coupons
5-64-403	Delivery, possession or manufacture of drug paraphernalia
5-65-103	DWI[4]"

Amendments. The 2001 amendment, in (*l*)(1)(A), inserted "residential burglary," deleted "and" following "subsequent offense" and inserted the language following "correctional resources" at the end.

The 2003 amendment by No. 245 inserted "Class A and Class B controlled substance felonies" in (j)(1)(A).

The 2003 amendment by No. 1018 added "or who is otherwise under the supervision of the Department of Community Correction" to the end of (f).

The 2005 amendment substituted "community correction" for "community punishment" throughout this section; and substituted "community correction" for "Regional punishment" in (b)(7)(A).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Community Correction Facility Placement, 26 UALR L.J. 441.

16-93-1203. Board of Corrections — Powers and duties.

The Board of Corrections shall have the following duties and responsibilities with regard to community correction programming:

(1) Establish community correction programs to which eligible offenders may be assigned as a condition of probation, sentenced to by the trial court pursuant to this subchapter, paroled to upon release from incarceration, or transferred to after incarceration in the Department of Correction;

(2) Notify the trial courts of the state having criminal jurisdiction of the availability of certified and approved community correction programs;

(3) Establish standards for the monitoring, auditing, and certification of community correction programs;

(4) Establish rules and regulations relating to the operation of community correction programs and the supervision of eligible offenders participating therein;

(5) Promote cooperation among the courts and various law enforcement and correctional agencies of this state in the implementation of community correction programs;

(6) Direct the departments and other entities involved in the implementation of community correction options in a manner that will promote the safety and welfare of the people of this state;

(7) Establish rules, regulations, and procedures which shall be required or deemed appropriate for the implementation and ongoing operation of community correction; and

(8) Establish minimum standards of eligibility and certification processes for all community correction programs eligible to receive offenders under this subchapter.

History. Acts 1993, No. 531, § 4; 1993, No. 548, § 4; 2005, No. 1994, § 287.

A.C.R.C. Notes. As enacted the introductory paragraph began: "Effective July 1, 1993."

Amendments. The 2005 amendment substituted "community correction" for "community punishment" throughout this section.

16-93-1204. Authorization.

(a) The Board of Corrections shall implement a correctional plan, to be developed in conjunction with the Arkansas Sentencing Commission, which ensures the efficient use of prison beds, which are becoming scarce resources, through the development and expansion of community correction options which will provide supervision, correction, and services to a primary target group of nonviolent offenders who would otherwise have been eligible for and likely to be sentenced to traditional incarceration.

(b) The community correction target group shall consist of those offenders:

(1) Who are involved in less serious criminal activity or are nonviolent by nature and crime, or both, even though the offender and the offense may be repetitive;

(2) Who are technical violators of community supervision; and

(3) Who are returning to the community from incarceration who are in need of enhanced supervision options due to the nature of their criminal conviction.

History. Acts 1993, No. 531, §§ 1, 2; 1993, No. 548, §§ 1, 2; 2005, No. 1994, § 287.

Amendments. The 2005 amendment substituted "correction" for "punishment" throughout this section; and, in (b), substituted "or" for "and/or" preceding "are nonviolent" and inserted "or both."

16-93-1205. Operation and supervision of community correction programs.

(a) The Board of Corrections shall promulgate policies, rules, and regulations relating to the operation of community correction facilities and programs, the supervision of eligible offenders participating therein, and the termination of that participation, including but not limited to:

(1) The terms, conditions, and qualifications of program eligibility;

(2) The time to be spent in specific correction and treatment programs designated as community correction;

(3) Receipt of compensation in the form of fees or other available sources from the eligible offender while participating in a community correction program;

(4) Allocation of compensation received by an eligible offender while participating in a community correction program, including designation to the Department of Community Correction of a percentage of any compensation received for the purpose of defraying the costs to the department of establishing and operating community correction programs and the costs of the offender's custody and care;

(5) Receipt of compensation from public entities who benefit from the labor of offenders involved in community correction work programs; and

(6) Collection of economic sanctions imposed by the court, including, but not limited to, restitution, fines, fees, or other monetary penalties attached to an offender's sentence.

(b) The department shall supervise all eligible offenders participating in any community correction program with the goal of promoting the safety and welfare of the people of the state.

History. Acts 1993, No. 531, § 5; 1993, No. 548, § 5; 2005, No. 1994, § 287.

Amendments. The 2005 amendment substituted "correction" for "punishment" throughout this section.

16-93-1206. Sentencing alternatives.

(a)(1) The trial court may require that either a presentence investigation be conducted by either the probation officer or presentence investigation officer assigned to the court or may require that the defense counsel of the person, the prosecuting authority, the probation officer, and other persons whom the trial court believes have knowledge or information relevant to the sentencing of the convicted person submit to the trial court the information in writing for the sentencing phase of the trial.

(2) Either the presentence investigation or information gathered by the above-mentioned parties shall be forwarded, with the commitment, to be retained in the offender's file.

(b) Upon determination by the court that the offender is an eligible offender and that placement in a community correction program is proper, the court may utilize the following methods of placement:

(1)(A) Suspend the imposition of the sentence or place the offender on probation, pursuant to § 5-4-104, § 5-4-201 et seq., and §§ 5-4-301 — 5-4-311.

(B) This sentence may be accompanied by assignment to a community correction program for a designated period of time commensurate with the goals of the program assignment and the rules and

regulations established by the Board of Corrections for the operation of community correction programs.

(C) The trial court shall maintain jurisdiction over the eligible offender sentenced in this manner with supervision outside the confines of the specific programming provided by probation officers assigned to the court;

(2)(A) In the event a person sentenced under subdivision (b)(1) of this section violates any terms or conditions of his or her sentence or term of probation, revocation of the sentence or term of probation shall be consistent with the procedures established by law for the revocation of suspended imposition of sentence or probation.

(B) Upon revocation, the court of jurisdiction shall determine whether the offender shall remain under the jurisdiction of the court and be assigned to a more restrictive community correction program, facility, or institution for a period of time or committed to the Department of Community Correction.

(C) If committed to the Department of Correction, the court shall specify if the commitment is for judicial transfer of the offender to the Department of Community Correction or is a regular commitment; and

(3)(A) Commit the eligible offender to the custody of the Department of Correction pursuant to this subchapter for judicial transfer to the Department of Community Correction subject to the following:

(i) That the sentence imposed provides that the offender shall serve no more than two (2) years of confinement, with credit for meritorious good time, with initial placement in a Department of Community Correction facility; and

(ii) That the initial placement in the Department of Community Correction is conditioned upon the offender's continuing eligibility for Department of Community Correction placement and the offender's compliance with all applicable rules and regulations established by the board for community correction programs.

(B) Post-prison supervision shall accompany and follow programming when appropriate.

(c) No offender may be excluded from placement in a community correction program based solely on the offender's inability to speak, read, write, or hear or to understand English.

History. Acts 1993, No. 531, § 6; 1993, No. 548, § 6; 1995, No. 1170, § 1; 1999, No. 485, § 1; 2005, No. 1994, § 287.

Amendments. The 2005 amendment substituted "community correction" for "community punishment" throughout this section; redesignated former (b)(1), (b)(1)(A) and (b)(1)(B) as present (b)(1)(A), (b)(1)(B) and (b)(1)(C); and inserted "or her" in (b)(2)(A).

RESEARCH REFERENCES

ALR. Validity of condition of probation, supervised release, or parole restricting computer use or internet access. 4 A.L.R.6th 1.

16-93-1207. Order of court.

(a) Upon the sentencing or placing on probation of any person under the provisions of this subchapter, the sentencing court shall issue an order or commitment, whichever is appropriate, in writing, setting forth the following:

(1) That the offender is being:

(A) Committed to the Department of Correction;

(B) Committed to the Department of Correction with judicial transfer to the Department of Community Correction;

(C) Placed on suspended imposition of sentence; or

(D) Placed on probation under the provisions of this subchapter;

(2) That the offender has knowledge and understanding of the consequences of the sentence or placement on probation and violations thereof;

(3) A designation of sentence or supervision length along with community correction program distinctions of that sentence or supervision length;

(4) Any applicable terms and conditions of the sentence or probation term; and

(5) Presentence investigation or sentencing information, including, but not limited to, criminal history elements and other appropriate or necessary information for correctional use.

(b)(1) Upon the successful completion of probation or a commitment to the Department of Correction with judicial transfer to the Department of Community Correction for one (1) of the offenses targeted by the General Assembly for community correction placement, the court may direct that the record of the offender be expunged of the offense of which the offender was either convicted or placed on probation under the condition that the offender has no more than one (1) previous felony conviction and that the previous felony was other than a conviction for:

(A) A capital offense;

(B) Murder in the first degree, § 5-10-102;

(C) Murder in the second degree, § 5-10-103;

(D) First degree rape, § 5-14-103;

(E) Kidnapping, § 5-11-102;

(F) Aggravated robbery, § 5-12-103; or

(G) Delivering controlled substances to a minor as prohibited in § 5-64-701(a)(2) [repealed].

(2) The fact that a prior felony conviction has been previously expunged shall not prevent its counting as a prior conviction for the purposes of this subsection.

(3) The procedure, effect, and definition of "expungement" for the purposes of this subsection shall be in accordance with that established in § 16-90-901 et seq.

History. Acts 1993, No. 531, § 7; 1993, No. 548, § 7; 1995, No. 998, § 10; 2005, No. 1994, § 477.

Amendments. The 2005 amendment substituted "community correction" for "community punishment" in (a)(3) and

(b)(1); in (b)(1), substituted "either convicted or placed on probation ... as prohibited in § 5-64-701(a)(2)" for "convicted under the following conditions"; deleted former (b)(1)(A)-(C); and made minor punctuation changes.

CASE NOTES

Jurisdiction.

The circuit court had jurisdiction to expunge the defendant's criminal record, notwithstanding that the judgment and disposition order did not specifically recite that he was sentenced under this section. Fulmer v. State, 337 Ark. 177, 987 S.W.2d 700 (1999).

Cited: Edwards v. State, 70 Ark. App. 127, 15 S.W.3d 358 (2000).

16-93-1208. Post commitment transfer.

(a)(1)(A) Upon commitment of an eligible offender to the Department of Correction, the Department of Correction will transfer the eligible offender to a community correction program, when he or she reaches his or her transfer date, in accordance with the rules and regulations promulgated by the Board of Corrections and conditions set by the Parole Board.

(B) Legal custody of inmates transferred to the Department of Community Correction shall remain with the Department of Correction unless altered by court order.

(2) A person eligible for release from incarceration on parole may be placed in community correction programming while under parole supervision upon the recommendation of the condition by the releasing authority.

(b)(1) The Board of Corrections and the Department of Correction are authorized to release medical and psychological data in their possession to a community correction service provider concerning an eligible offender transferred to that community correction program.

(2) The community correction service provider shall use any medical or psychological data received from the Department of Correction and the Board of Corrections in compliance with rules concerning the use of that data as adopted by the Board of Corrections.

History. Acts 1993, No. 531, § 8; 1993, No. 548, § 8; 1995, No. 1170, § 2; 2005, No. 186, § 2; 2005, No. 1994, § 288.

Amendments. The 2005 amendment by No. 186 deleted former (a)(2); and redesignated former (a)(3) as present (a)(2).

The 2005 amendment by No. 1994 substituted "community correction" for "community punishment" throughout this section; and inserted "or her" and "or she" in (a)(1)(A).

16-93-1209. Liability.

The Department of Correction, the Board of Corrections, the Department of Community Correction, the Parole Board, and all governmental agencies and units utilizing eligible offenders in community correction programs as defined in this subchapter are immune from liability and suit for damages, and no tort action shall lie against the Department of Correction, the Board of Corrections, the Department of Community Correction, the Parole Board, and any governmental agency or unit or

any of their employees because of any acts of eligible offenders utilized under the provisions of this subchapter.

History. Acts 1993, No. 531, § 9; 1993, No. 548, § 9; 2005, No. 1994, § 288.

Amendments. The 2005 amendment substituted "community correction programs" for "community punishment programs."

16-93-1210. Sentence optional.

Nothing in this subchapter shall grant any offender the right to be sentenced or transferred under this subchapter as a matter of right.

History. Acts 1993, No. 531, § 10; 1993, No. 548, § 10.

Subchapter 13 — Criteria for Transfer to Community Punishment Programs

SECTION.
16-93-1301. Transfer provisions.
16-93-1302. Transfer procedures.
16-93-1303. Computation of sentence.
16-93-1304. Revocation of transfer.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 19-93-203 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Identical Acts 1994, Nos. 8 and 9, § 7: Mar. 4, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that the correctional policies of the State of Arkansas are in need of immediate reform in order to better provide for a balanced correctional system and to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community and passage of this act is necessary to facilitate these reforms. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1994 (2nd Ex. Sess.), No. 19, § 5: Aug. 22, 1994. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas meeting in the Second Extraordinary Session of 1994 that the Arkansas Community Punishment Act provides for too little opportunity to sentence and transfer eligible offenders to community punishment facilities and that the correctional policies of the State of Arkansas need immediate revision in order to better effectuate the rehabilitation of persons convicted of crimes and to make possible their return as useful members of the community. Therefore, in order to increase the number of persons who are eligible for transfer and sentencing to the community punishment facilities, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 577, § 6: Mar. 9, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that the inmate transfer provisions of Arkansas Code 16-93-206 and 1301 expire on April 1, 1995; that those provisions should continue in effect until April 1, 1997; that this act so provides; and that unless this act goes into effect immediately it will not be effective until after the expiration of those provisions. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 1170, § 13: Apr. 11, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion exists regarding the status of ineligible offenders judicially transferred to Department of Community Punishment facilities; that there is an immediate need to clarify the law applicable to transferring ineligible offenders back to the Department of Correction; and that it is in the best interest of the courts which already have crowded documents to immediately reduce the reporting requirements for departure sentences. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Procedure, 16 UALR L.J. 99.

16-93-1301. Transfer provisions.

(a) As used in this subchapter, "felonies" means those crimes classified as Class Y, Class A, Class B, Class C, Class D, or unclassified felonies by the laws of this state.

(b)(1) Persons who committed felonies prior to January 1, 1994, and who were convicted and incarcerated for those felonies shall be eligible for release on parole in accordance with the parole eligibility law in effect at the time the crime was committed.

(2) Persons who committed target offenses under the Community Punishment Act, § 16-93-1201 et seq., prior to January 1, 1994, and who have not been sentenced to a term of incarceration may waive the right to be released under the parole eligibility law in effect at the time the crimes were committed and shall become eligible for judicial transfer pursuant to the transfer provisions provided in subdivision (c)(2) of this section.

(3) Persons who have committed felonies who are within a target group as currently defined under § 16-93-1202(j)(1) and who are released on parole shall be eligible, pursuant to rules and regulations established by the Parole Board, for commitment to a community correction facility if they are found to be in violation of any of their parole conditions, unless the parole violation constitutes a nontarget felony offense.

(c) Persons who commit felonies on or after January 1, 1994, and who shall be convicted and incarcerated for those felonies shall be eligible for transfer to community correction as follows:

(1)(A) Inmates under sentence of death or life imprisonment without parole shall not be eligible for transfer, but may be pardoned or have their sentences commuted by the Governor as provided by law.

(B) Inmates sentenced to life imprisonment shall not be eligible for transfer unless the sentences are commuted to a term of years by executive clemency.

(C) Upon commutation, inmates shall be eligible for transfer as provided in this subchapter;

(2)(A)(i)(*a*) Offenders convicted of a target offense under the Community Punishment Act, § 16-93-1201 et seq., may be committed to the Department of Correction and judicially transferred to the Department of Community Correction by specific provision in the commitment that the trial court orders such a transfer.

(*b*) No other offenders are eligible for transfer to a Department of Community Correction facility.

(ii) A copy of the commitment shall be forwarded immediately to the Department of Correction and to the Department of Community Correction.

(iii) In the event that an offender is sentenced to the Department of Correction without judicial transfer on one (1) sentence and concurrently sentenced to the Department of Correction with judicial transfer on another sentence, the offender shall remain in the Department of Correction, and the sentence with judicial transfer may be discharged in the same manner as those offenders transferred back to the Department of Correction.

(B) The Department of Community Correction shall take over supervision of the offender in accordance with the order of the court.

(C) The Department of Community Correction shall provide for the appropriate disposition of the offender as expeditiously as practicable under rules and regulations developed by the Board of Corrections.

(D) The offender shall not be transported to the Department of Correction on the initial placement in a Department of Community Correction facility pursuant to a judicial transfer.

(E) An offender who is transferred back to the Department of Correction for disciplinary reasons may be considered for transfer to Department of Community Correction supervision after earning good-time credit equal to one-half (½) of the remainder of his or her sentence.

(F) An offender who is transferred back to the Department of Correction for administrative reasons may be considered for transfer to Department of Community Correction supervision after earning good-time credit equal to one-half (½) of his or her sentence; and

(3)(A) All other classified or unclassified felons who are incarcerated therefor shall be eligible for transfer to community punishment after having served one-third (⅓) or one-half (½), with credit for meritorious good time, of their sentences depending on the seriousness determination made by the Arkansas Sentencing Commission, or one-half (½), with credit for meritorious good time, of the time to which their sentences are commuted by executive clemency.

(B) For example, a six-year sentence with optimal meritorious good-time credits will make the offender eligible for transfer in one (1) year if he or she is required to serve one-third (⅓) of his or her sentence, or one and one-half (1½) years if he or she is required to serve one-half (½) of his or her sentence.

History. Acts 1993, No. 534, § 1; 1993, No. 555, § 1; 1994 (1st Ex. Sess.), No. 8, § 2; 1994 (1st Ex. Sess.), No. 9, § 2; 1994 (2nd Ex. Sess.), No. 19, § 1; 1995, No. 1170, § 3; 1997, No. 945, § 3; 2001, No. 904, § 1; 2005, No. 1994, § 478.

A.C.R.C. Notes. Acts 1995, No. 577, § 2, provided: "The inmate transfer provisions in Arkansas Code Annotated 16-93-206(b)(1)(A)(ii) and 16-93-1301(b)(2) shall expire on April 1, 1997." The reference to 16-93-1301(b)(2) is interpreted to be a reference to current 16-93-1301(b)(4), which was redesignated by the 1994 (2nd Ex. Sess.) amendment.

Publisher's Notes. Identical Acts 1994 (1st Ex. Sess.), Nos. 8 and 9, § 3, provided: "The inmate transfer provisions in Arkansas Code Annotated § 16-93-206(b)(1)(A)(ii) and § 16-93-1301(b)(2) shall expire on April 1, 1995."

Amendments. The 2001 amendment, in (b)(3), deleted "and" following "felonies," substituted "§ 16-93-1202 (*l*)(1)" for "Community Punishment Act, § 16-93-1201 et seq.," inserted "be eligible," deleted "be eligible" preceding "for commitment," substituted "felony" for "criminal," and made minor punctuation changes.

The 2005 amendment substituted "community correction" for "community punishment" in (b)(3) and (c); inserted "non-target" in (b)(3); and, in (c)(3)(B), inserted "or she" twice and "or her" twice.

16-93-1302. Transfer procedures.

(a)(1)(A) Inmates under sentence for all felonies except those listed in subsection (b) of this section will be transferred from the Department of Correction to the Department of Community Correction subject to rules and regulations promulgated by the Board of Corrections and conditions set by the Parole Board.

(B) This review may be conducted without a hearing when the inmate has not received a major disciplinary report against him or her which resulted in the loss of good time, there has not been a request by a victim to have input on transfer conditions, and there is no indication in the risk/needs assessment review that special conditions need to be placed on the inmate.

(2)(A) When one (1) or more of the circumstances in subdivision (a)(1) of this section are present, the Parole Board shall conduct a hearing to determine the appropriateness of the inmate for transfer.

(B) The Parole Board has two (2) options:

(i) To transfer the individual to the Department of Community Correction accompanied by conditions of the transfer, including, but not limited to, supervision levels, programming requirements, and facility placement when appropriate; or

(ii) To deny transfer based on a set of established criteria and to accompany the denial with a course of action to be undertaken by the inmate to rectify the Parole Board concerns.

(C) Upon completion of the course of action determined by the Parole Board, after final review of the inmate's file to ensure successful completion, the Parole Board shall authorize the inmate's transfer to the Department of Community Correction in accordance with administrative policies and procedures governing the transfer and subject to conditions attached to the transfer.

(3) Should an inmate fail to fulfill the course of action outlined by the Parole Board to facilitate transfer to community correction, it shall be the responsibility of the inmate to petition the Parole Board for rehearing.

(b)(1) Inmates under sentence for the following Class Y felonies shall be eligible for discretionary transfer to the Department of Community Correction by the Parole Board after having served the time required as set by the Arkansas Sentencing Commission with credit for meritorious good time:

(A) Murder in the first degree, § 5-10-102;

(B) Kidnapping, § 5-11-102;

(C) Rape, § 5-14-103;

(D) Aggravated robbery, § 5-12-103;

(E) Causing a catastrophe, § 5-38-202(a);

(F) Engaging in a continuing criminal enterprise, § 5-64-405; and

(G) The manufacture or delivery of a schedule I or schedule II controlled substance which by aggregate weight including adulterants or diluents is greater than twenty-eight grams (28 g), § 5-64-401(a)(1).

(2)(A) Review of inmates convicted of the enumerated offenses in subdivision (b)(1) of this section shall be based upon policies and procedures adopted by the Parole Board for the review.

(B) The policies and procedures shall include provision for notification of victims, that a hearing shall be held and records kept of such proceedings, and that there be a listing of the criteria upon which a denial may be based.

(3) All transfers of offenders specified in this subsection shall be issued upon order, duly adopted, of the Parole Board in accord with such policies and procedures.

(c)(1) The course of action required by the Parole Board shall not be outside the current resources of the Department of Correction nor the conditions set be outside the current resources of the Department of Community Correction.

(2) However, the departments shall strive to accommodate the actions required by the Board of Corrections to the best of their ability.

(d) Transfer is not an award of clemency and it shall not be considered as a reduction of sentence or a pardon.

(e) Every inmate while on transfer status shall remain in the legal custody of the Department of Correction, under the supervision of the Department of Community Correction, and subject to the orders of the Parole Board.

(f) Inmates who are sentenced under the provisions of § 5-4-501(c) or (d) for serious violent felonies or felonies involving violence may be considered eligible for parole or for community correction transfer upon reaching regular parole or transfer eligibility, but only after reaching a minimum age of fifty-five (55) years.

History. Acts 1993, No. 534, § 2; 1993, No. 555, § 2; 1995, No. 1009, § 2; 1995, No. 1011, § 2; 2005, No. 1994, § 289.

Amendments. The 2005 amendment inserted "or her" in (a)(1)(B); and substituted "community correction" for "community punishment" in (a)(3) and (f).

CASE NOTES

Eligibility.

Where defendant was convicted of the Class Y felony of rape and the trial court found that he had been previously convicted of two felonies involving violence listed in § 5-4-501(d), namely rape and kidnapping, the defendant should have received a sentence of "not less than life imprisonment" with an eligibility for parole as set out in this section; thus, the trial court's sentence of life imprisonment without parole was illegal. Mayes v. State, 351 Ark. 26, 89 S.W.3d 926 (2002).

16-93-1303. Computation of sentence.

(a)(1) Time served shall be deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction.

(2) Time served shall continue only during the time in which an individual is actually confined in a county jail or other local place of lawful confinement or while under the custody and supervision of the Department of Correction.

(3) Once sentenced to the Department of Correction, the department shall retain legal custody of the inmate for the duration of the original sentence.

(b) The sentencing judge shall direct, when he or she imposes sentence, that time already served by the defendant in jail or other place of detention shall be credited against the sentence.

History. Acts 1993, No. 534, § 3; 1993, No. 555, § 3.

16-93-1304. Revocation of transfer.

(a) In the event an offender transferred under the provisions of this subchapter violates the terms or conditions of his transfer, a hearing shall follow all applicable legal requirements and shall be subject to any additional policies, rules, and regulations set by the Parole Board.

(b)(1) In the event an offender transferred under the provisions of this subchapter is found to be or becomes ineligible for transfer into a Department of Community Correction facility, he or she shall be transported to the Department of Correction to serve the remainder of his sentence.

(2) Notice of the ineligibility and the reasons therefor shall be provided to the offender, and a hearing may be requested before the board if the offender contests the factual basis of the ineligibility. Otherwise, the board may administratively approve the transfer to the Department of Correction.

(c) An offender who is judicially transferred to a Department of Community Correction facility and subsequently transferred back to the Department of Correction by the board for disciplinary or administrative reasons may become eligible for any further transfer under § 16-93-1301(c)(2)(E) and (F).

History. Acts 1993, No. 534, § 4; 1993, No. 555, § 4; 1995, No. 1170, § 4.

Subchapter 14 — Notification of Offenders' Acquired Immune Deficiency Syndrome Status

SECTION.
16-93-1401. Definitions.
16-93-1402. Notice to probation or parole officer.

A.C.R.C. Notes. References to "this chapter" in §§ 16-93-202 and 16-93-203 may not apply to this subchapter which was enacted subsequently.

16-93-1401. Definitions.

As used in this subchapter:

(1) "Correctional institution" means any state or privately operated prison, community correctional facility, county jail, city jail, or any other state, local, or privately operated detention facility; and

(2) "Parole or probation officer" means a parole or probation officer of the Department of Community Correction.

History. Acts 1997, No. 282, § 1.

16-93-1402. Notice to probation or parole officer.

(a) The purpose of this subchapter is to provide probation officers and parole officers with information so they can make informed programming decisions and direct offenders to autoimmune deficiency syndrome-related resources, including appropriate financial, housing, legal, medical, and counseling services.

(b) Upon the release of an offender from a correctional institution, a medical representative of the institution shall notify the offender's parole or probation officer when the offender has tested positive for infection with human immunodeficiency virus (HIV), or has been diagnosed as having acquired deficiency syndrome (AIDS) or acquired immune deficiency syndrome-related conditions.

(c) Information obtained by a parole or probation officer pursuant to this subchapter shall be confidential and shall not be disclosed except as specifically authorized by this subchapter.

History. Acts 1997, No. 282, § 2.

Subchapter 15 — Parole — Sentence Served in County Jail

SECTION.
16-93-1501. Parole for inmates who have served their term of imprisonment in a county jail prior to being processed

SECTION.
into the Department of Correction.
SECTION.
16-93-1502. Program eligibility.

16-93-1501. Parole for inmates who have served their term of imprisonment in a county jail prior to being processed into the Department of Correction.

Subject to conditions set by the Parole Board, all offenders convicted of a felony, and sentenced to a term of imprisonment of two (2) years or less in the Department of Correction, and who have served their term of imprisonment in a county jail prior to being processed into the Department of Correction, may be paroled from the Department of Correction county jail backup facility directly to the Department of Community Correction under parole supervision, and upon eligibility determination, processed for release by the board.

History. Acts 2003, No. 1394, § 1.

16-93-1502. Program eligibility.

(a) Offenders who have been found guilty of or pleaded guilty or nolo contendere to a violent offense as defined by § 12-12-1103(11) [repealed] or a Class Y felony offense shall be ineligible to participate in the program established by this subchapter.

(b) As determined by the county sheriff, offenders who have committed violent or sexual acts while incarcerated in a county jail facility shall be ineligible to participate in the program established by this subchapter.

History. Acts 2003, No. 1394, § 2.

Subchapter 16 — Transitional Housing Facilities

SECTION.
16-93-1601. Legislative intent.
16-93-1602. Definitions.
16-93-1603. Powers and duties of the Board of Corrections.
SECTION.
16-93-1604. Powers and duties of the Department of Community Correction.

A.C.R.C. Notes. Acts 2005, No. 678, § 1, provided: "Legislative intent. It is the intent of the General Assembly to:

"(a) Establish rules for facilities that house offenders who have been transferred, paroled, or placed on probation through the Arkansas criminal justice system in order to promote, protect, and improve the health, safety, and welfare of the citizens of the State of Arkansas; and

"(b) Establish these rules in order to help reduce recidivism in our criminal justice system and to provide regulations to protect the individuals in the programs and to protect the neighborhoods and communities in which the programs and facilities are located."

This subchapter is set out below as enacted by Acts 2005, No. 1378, § 1. Acts 2005, No. 678, § 2, also enacted a new subchapter 16 of this chapter concerning transitional housing facilities which could not be conformed to the later act, to read as follows:

"19-93-1601. Definitions.

"As used in this subchapter:

"(1) 'Applicant' means any individual, business, or organization that has applied to receive an Arkansas Transitional Housing Facility License;

"(2) 'License' means Arkansas Transitional Housing Facility License; and

"(3) 'Transitional housing' means a program that provides housing for one (1) or more offenders who have either been transferred or paroled from the Department of Correction by the Post Prison Transfer Board or placed on probation by a circuit or district court. An offender's home or the residence of an offender's family member shall not be considered a transitional housing facility for purposes of this subchapter.

"16-93-1602. Powers and duties of the Board of Corrections.

"(a) The Board of Corrections shall promulgate rules that will set minimum standards for all transitional housing facilities in the State of Arkansas.

"(b) All of the standards set by the rules described in subsection (a) of this section must be established prior to the Post Prison Transfer Board or a district or circuit court releasing a transferee, parolee, or probationer to a transitional housing facility as a resident.

"(c) The rules described in subsection (a) of this section shall include at least the following:

"(1) Compliance with any local health and safety codes, including housing codes, fire codes, plumbing codes, and electrical codes, set by the jurisdiction or jurisdictions in which the facility is located;

"(2) Compliance with any local zoning ordinances;

"(3) Compliance with any state and federal health and safety codes

"(4) Allowable ratio of facility square footage to residents; and

"(5) Allowable ratio of bathing and restroom facilities to residents.

"(d)(1) The rules described in subsection (a) of this section shall be promulgated on or before January 1, 2006.

"(2) The Board of Corrections is authorized to make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

"16-93-1603. Powers and duties of the Department of Community Correction.

"(a) The Department of Community Correction shall implement the rules described in § 16-93-1602 on or before July 1, 2006.

"(b)(1) The Department of Community Correction shall be responsible for the enforcement of the rules established by the Board of Corrections under § 16-93-1602.

"(2) The Department of Community Correction shall establish all procedures and forms it deems necessary to implement the rules, and the procedures shall include, but not be limited to, the following:

"(A) Creating a state-issued Arkansas Transitional Housing Facility License for applicant facilities that have met the standards established by the rules of the Board of Corrections;

"(B) Establish the process to be followed by individuals, businesses, or organizations in making application to the Department of Community Correction to receive a state-issued license to operate an approved transitional housing facility, which will include a reasonable application fee to be established by the Board of Corrections;

"(C) Establish procedures for the Department of Community Correction to accept applications for facilities wishing to obtain a license to operate a transitional housing facility and to investigate whether applicants meet the standards established by the rules of the Board of Corrections;

"(D) Establish procedures for the Department of Community Correction to notify an applicant when its application has been approved or denied. All denials shall specify in writing the reason for the application's denial;

"(E) Establish procedures to investigate complaints that a licensed facility is in violation of the standards established by the rules of the Board of Corrections; and

"(F) Establish procedures for the Department of Community Correction to suspend or revoke licenses when a license holder is no longer in compliance with or violates the rules of the Board of Corrections.

"(c) The Director and staff of the Department of Community Correction shall provide administrative support to the Board of Corrections."

16-93-1601. Legislative intent.

It is the intent of the General Assembly to:

(1) Establish rules for facilities that house offenders who have been transferred, paroled, or placed on probation through the Arkansas criminal justice system in order to promote, protect, and improve the health, safety, and welfare of the citizens of the State of Arkansas; and

(2) Establish these rules in order to help reduce recidivism in our criminal justice system and to provide regulations to protect the individuals in the programs and to protect the neighborhoods and communities in which the programs and facilities are located.

History. Acts 2005, No. 1378, § 1.

16-93-1602. Definitions.

As used in this subchapter:

(1) "Applicant" means any individual, business, or organization that has applied to receive an Arkansas transitional housing facility license;

(2) "License" means an Arkansas transitional housing facility license; and

(3)(A) "Transitional housing" means a program that provides housing for one (1) or more offenders who either have been transferred or paroled from the Department of Correction by the Parole Board or placed on probation by a circuit court or district court.

(B) An offender's home or the residence of an offender's family member shall not be considered a transitional housing facility as used in this subchapter.

History. Acts 2005, No. 1378, § 2.

16-93-1603. Powers and duties of the Board of Corrections.

(a) The Board of Corrections shall promulgate rules that shall set minimum standards for all transitional housing facilities in the State of Arkansas.

(b) All of the standards set by the rules described in subsection (a) of this section shall be established prior to the Parole Board's or a district or circuit court's releasing a transferee, parolee, or probationer to a transitional housing facility as a resident.

(c) The rules described in subsection (a) of this section shall include at least the following:

(1) Compliance with any local health and safety codes, including housing codes, fire codes, plumbing codes, and electrical codes, set by the jurisdiction or jurisdictions in which the transitional housing facility is located;

(2) Compliance with any local zoning ordinances;

(3) Compliance with any state and federal health and safety codes;

(4) Consideration of geographic dispersement of transitional housing facilities;

(5) Allowable ratio of transitional housing facility square footage to residents; and

(6) Allowable ratio of bathing facilities and restroom facilities to residents.

(d)(1) The rules described in subsection (a) of this section shall be promulgated on or before January 1, 2006.

(2) The Board of Corrections may make additions, amendments, changes, or alterations to the rules in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

History. Acts 2005, No. 1378, § 2.

16-93-1604. Powers and duties of the Department of Community Correction.

(a) The Department of Community Correction shall implement the rules described in § 16-93-1603 on or before July 1, 2006.

(b)(1) The department shall be responsible for the enforcement of the rules established by the Board of Corrections under § 16-93-1603.

(2) The department shall establish all procedures and forms that it deems necessary to implement the rules, and the procedures shall include, but not be limited to, the following:

(A) Creating a state-issued Arkansas transitional housing facility license for applicant facilities that have met the standards established by the rules of the board;

(B) Establishing the process to be followed by an applicant in making application to the department to receive a license to operate an approved transitional housing facility, which shall include a reasonable application fee to be established by the board;

(C) Establishing procedures for the department to accept applications for facilities wishing to obtain a license to operate a transitional housing facility and to investigate whether applicants meet the standards established by the rules of the board;

(D)(i) Establishing procedures for the department to notify an applicant when its application has been approved or denied.

(ii) All denials shall specify in writing the reason for the application's denial;

(E) Establishing procedures to investigate complaints that a licensed transitional housing facility is in violation of the standards established by the rules of the board; and

(F) Establishing procedures for the department to suspend or revoke a license when a license holder is no longer in compliance with or violates the rules of the board.

(c) The Director of the Department of Community Corrections and the staff of the department shall provide administrative support to the board.

History. Acts 2005, No. 1378, § 2.

CHAPTER 94

EXTRADITION

SUBCHAPTER.

1. General Provisions.
2. Uniform Criminal Extradition Act.

RESEARCH REFERENCES

Am. Jur. 31A Am. Jur. 2d, Extrad., § 1 et seq.

Ark. L. Rev. Conflict of Laws, 3 Ark. L. Rev. 25.

Conflict of Laws: Arkansas, 32 Ark. L. Rev. 1.

Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191.

C.J.S. 35 C.J.S., Extrad., § 1 et seq.

Subchapter 1 — General Provisions

SECTION.

16-94-101. Expenses incurred in return of fugitives.
16-94-102. Transfer of convicted foreign citizens or nationals under treaty.
16-94-103. Waiver of extradition warrant.

Effective Dates. Acts 1925, No. 364, § 3: approved Apr. 1, 1925. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, for the reason that several persons are now under indictment and a delay might defeat their return to the State, hence an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage."

Acts 1981, No. 71, § 3: Feb. 16, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that Arkansas law does not presently specifically authorize the Governor to consent to the transfer of convicted foreign nationals to their country of citizenship, and that this Act is immediately necessary to provide such authorization. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-94-101. Expenses incurred in return of fugitives.

(a) County judges may and are authorized and empowered to pay out of the general revenue fund of the county the necessary expenses incurred by the sheriff of the county incident to the return of fugitives to the state.

(b) In order for a sheriff or his or her deputy to avail himself or herself of the provisions of this section, it shall be necessary to secure a requisition from the Governor for the return of the fugitive and to file an itemized account of the necessary expenses incurred in the capture and

return of the fugitive to the state, which account shall be properly sworn to and verified.

History. Acts 1925, No. 364, §§ 1, 2; Pope's Dig., §§ 6110, 6111; A.S.A. 1947, §§ 43-3029, 43-3030.

16-94-102. Transfer of convicted foreign citizens or nationals under treaty.

When a treaty is in effect between the United States and a foreign country providing for the transfer of a convicted offender who is a citizen or national of the foreign country to that country, the Governor is authorized, subject to the terms of the treaty, to consent to the transfer of the convicted offender.

History. Acts 1981, No. 71, § 1; A.S.A. 1947, § 43-3002.1.

16-94-103. Waiver of extradition warrant.

(a)(1) Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement or broken the terms of his or her bail, probation, or parole may waive the issuance and service of the warrant provided under the Uniform Criminal Extradition Act, § 16-94-201 et seq., and all other procedures incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he or she consents to return to the demanding state.

(2) Before the waiver shall be executed or subscribed to by the person, it shall be the duty of such judge to inform such person of his or her rights to await the issuance and service of a warrant of extradition and to contest extradition following issuance of the warrant of the Governor as provided for in § 16-94-207.

(3) Following waiver of extradition, the person shall be placed in custody without bail to await delivery to the agent of the demanding state.

(4) The agent of the demanding state need not be present at the waiver.

(b)(1) If and when the consent has been duly executed, it shall immediately be forwarded to the office of the Governor of this state and filed there.

(2) The judge shall direct the officer having the person in custody to deliver forthwith the person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to the agent or agents a copy of such consent.

(c) Nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an

exclusive procedure or to limit the powers, rights, or duties of the officers of the demanding state or of this state.

(d) Notwithstanding any other provision of law, a law enforcement agency in this state holding a person who is alleged to have broken the terms of his or her probation, parole, bail, or any other release in the demanding state shall immediately deliver the person to the duly authorized agent of the demanding state without the requirement of a Governor's warrant if all of the following apply:

(1) Waiver. The person has signed a prior waiver of extradition as a term of his or her current probation, parole, bail, or other release in the demanding state; and

(2) Authenticated Copy. The law enforcement agency holding the person has received an authenticated copy of the prior waiver of extradition signed by the person and photographs or fingerprints or other evidence properly identifying the person as the person who signed the waiver.

History. Acts 1995, No. 841, § 1.

Subchapter 2 — Uniform Criminal Extradition Act

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Publisher's Notes. For Comments regarding the Uniform Criminal Extradition Act, see Commentaries Volume B.

CASE NOTES

Analysis

Executive agreement.
Taking of prisoner.
Time of trial.

Executive Agreement.

An executive agreement providing for the return of prisoners to another state after their trial in Arkansas on robbery charges, but before serving their sentences in Arkansas, was not violative of this subchapter nor invalid as an interstate agreement made without consent of Congress and was not a violation of due process. Hinkle v. Rockefeller, 249 Ark. 110, 458 S.W.2d 371 (1970).

Taking of Prisoner.

This subchapter does not place any limit on the time during which the agent of the demanding state must take charge of the prisoner. Long v. Cauthron, 22 Ark. App. 1, 731 S.W.2d 792 (1987).

Time of Trial.

A person incarcerated in a sister state at the time of his indictment in Arkansas has the right to ask Arkansas to extradite him for trial but, if the sister state refuses or requires some kind of waiver which the prisoner does not accomplish, the prisoner will not be entitled to discharge under § 16-89-101(b)(2); however, if the sister state does agree to extradition upon conditions met, then Arkansas must extradite and try the prisoner with due diligence or he will be entitled to the benefit of § 16-89-101(b)(2). Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955).

16-94-201. Definitions.

Where appearing in this subchapter, the term "Governor" includes any person performing the functions of Governor by authority of the law of this state. The term "executive authority" includes the Governor and any person performing the functions of governor in a state other than this state. And the term "state" referring to a state other than this state refers to any other state or territory organized or unorganized of the United States of America.

History. Acts 1935, No. 126, § 1; Pope's Dig., § 6081; A.S.A. 1947, § 43-3001.

16-94-202. Duty of Governor.

Subject to the qualifications of this subchapter, and the provisions of the Constitution of the United States controlling, and acts of Congress in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

History. Acts 1935, No. 126, § 2; Pope's Dig., § 6082; A.S.A. 1947, § 43-3002.

CASE NOTES

Analysis

In general.
Arrest.

In General.

The act of honoring a requisition from a foreign state by the executive branch of this state is a summary one conditioned on the Governor finding that the documents presented by the demanding state meet the requirements of the extradition statutes. Rivera v. State, 19 Ark. App. 100, 717 S.W.2d 493 (1986).

Arrest.

Evidence sufficient to authorize the governor of Arkansas to issue a warrant to arrest the defendant and hold him in jail for extradition. Hammond v. State, 244 Ark. 186, 424 S.W.2d 861 (1968), cert. denied, 393 U.S. 839, 89 S. Ct. 116, 21 L. Ed. 2d 109 (1968).

16-94-203. Procedure generally.

No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth.

History. Acts 1935, No. 126, § 3; Pope's Dig., § 6083; A.S.A. 1947, § 43-3003.

CASE NOTES

Analysis

Extraditable offenses.
Federal law.
Sufficiency of affidavit.
Variance.

Extraditable Offenses.

Misdemeanors are extraditable offenses. Glover v. State, 257 Ark. 241, 515 S.W.2d 641 (1974).

Federal Law.

The Uniform Criminal Extradition Act must be considered along with the federal statutes because the federal act controls where there is an inconsistency, however, the legislature of the asylum state may permit its governor to surrender a fugitive on terms less exacting than those imposed by Congress. Glover v. State, 257 Ark. 241, 515 S.W.2d 641 (1974).

Any information supported by an affidavit is adequate to meet the requirements of extradition in this state regardless of federal law requiring that an indictment or affidavit before a magistrate be issued by the requesting state before it can be honored. Carrico v. Pearson, 262 Ark. 278, 555 S.W.2d 951 (1977).

Sufficiency of Affidavit.

Evidence sufficient to show defendant was lawfully charged by information supported by an affidavit sufficient to warrant the issuance of the warrant of extradition by the Governor. Glover v. State, 257 Ark. 241, 515 S.W.2d 641 (1974).

Extradition warrant issued in another state was not void where the defendant fell far short of proving that the affidavit on which such warrant was issued was erroneous, untrue, or insufficient. Wilkins

v. State, 258 Ark. 578, 528 S.W.2d 382 (1975).

Variance.

In habeas corpus proceeding to prevent extradition, alleged variance in the charge as set out by affidavit and information and proof offered need not be considered where there was a "substantial charge" of a violation of the laws of the demanding state. Stuart v. Johnson, 192 Ark. 757, 94 S.W.2d 715 (1936).

16-94-204. Investigation by Attorney General.

When a demand shall be made upon the Governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him or her the situation and circumstances of the person so demanded and whether he or she ought to be surrendered.

History. Acts 1935, No. 126, § 4; Pope's Dig., § 6084; A.S.A. 1947, § 43-3004.

CASE NOTES

Other Investigators.

This section does not preclude the governor from employing persons other than the attorney general to make the investigation concerning the requested extradition nor from relying on the report of and information supplied by such person in determining whether or not to issue the warrant. Hammond v. State, 244 Ark. 186, 424 S.W.2d 861, cert. denied, 393 U.S. 839, 89 S. Ct. 116, 21 L. Ed. 2d 109 (1968).

16-94-205. Warrant generally.

A warrant of extradition must not be issued unless documents presented by the executive authority making the demand show that:

I. Except in cases arising under § 16-94-206, the accused was present in the demanding state at the time of the commission of the alleged crime, and thereafter fled from the state;

II. The accused is now in this state; and

III. He or she is lawfully charged by indictment found or by information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he or she has been convicted of a crime in that state and has escaped from confinement or broken his or her parole.

History. Acts 1935, No. 126, § 5; Pope's Dig., § 6085; A.S.A. 1947, § 43-3005.

CASE NOTES

Requirements for Issuance.

Defendant was lawfully charged by information supported by affidavit as to the facts sufficient to warrant the issuance of the warrant of extradition by the governor. Glover v. State, 257 Ark. 241, 515 S.W.2d 641 (1974).

16-94-206. Absence of fugitive from other state when crime committed.

The Governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in § 16-94-205 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand; and the provisions of this subchapter not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime and has not fled therefrom.

History. Acts 1935, No. 126, § 6; Pope's Dig., § 6086; A.S.A. 1947, § 43-3006.

CASE NOTES

Analysis

Constitutionality.
In general.

Constitutionality.

This section is based on a valid exercise of the police power of the state. Lindley v. Crider, 223 Ark. 200, 265 S.W.2d 498 (1954).

In General.

A person need not be a fugitive from the requesting state in order to be extradited to that state; a person may be extradited if he is found to be a nonfugitive accused of committing an act in Arkansas intentionally resulting in a crime in the requesting state. Fullerton v. McCord, 339 Ark. 45, 2 S.W.3d 775 (1999).

16-94-207. Governor to sign warrant.

If the Governor shall decide that the demand should be complied with, he or she shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to a sheriff, marshal, coroner, or other person whom he or she may think fit to entrust with the execution thereof; and the warrant must substantially recite the facts necessary to the validity of its issue.

History. Acts 1935, No. 126, § 7; Pope's Dig., § 6087; A.S.A. 1947, § 43-3007.

CASE NOTES

Analysis

Habeas corpus.
Source of information.

Habeas Corpus.

Contention in habeas corpus proceeding to prevent extradition that charge is barred by limitation was a matter of defense to the charge not offerable as a ground for a writ of habeas corpus. Stuart v. Johnson, 192 Ark. 757, 94 S.W.2d 715 (1936).

After the issuance of the Governor's warrant, the only proceeding available to an accused in an extradition proceeding was by petition for a writ of habeas corpus, and the only matters for the court to consider in such case were the identity of the accused and if he was a fugitive. Cadle v. Cauthron, 266 Ark. 419, 584 S.W.2d 6 (1979).

Source of Information.

Legality of the Governor's action in signing the warrant of arrest is not dependent on the source of the information upon which he acts. Hammond v. State, 244 Ark. 186, 424 S.W.2d 861, cert. denied, 393 U.S. 839, 89 S. Ct. 116, 21 L. Ed. 2d 109 (1968).

The Governor of the State of Arkansas is not required by the constitution or this subchapter to make an investigation outside the record nor to hold a hearing to allow the accused to present his views; if the papers furnished by the demanding state supply the necessary information, it is not necessary for the governor to look further. Cadle v. Cauthron, 266 Ark. 419, 584 S.W.2d 6 (1979).

16-94-208. Contents of warrant.

Such warrant shall authorize the officer or other person to whom directed to arrest the accused at any place where he may be found within the state and to command the aid of all sheriffs and other peace officers in the execution of the warrant, and to deliver the accused subject to the provisions of this subchapter to the duly authorized agent of the demanding state.

History. Acts 1935, No. 126, § 8; Pope's Dig., § 6088; A.S.A. 1947, § 43-3008.

16-94-209. Arresting officer.

Every such officer or other person empowered to make the arrest shall have the same authority in arresting the accused to command assistance therein, as sheriffs and other officers have by law in the execution of any criminal process directed to them, with the like penalties against those who refuse their assistance.

History. Acts 1935, No. 126, § 9; Pope's Dig., § 6089; A.S.A. 1947, § 43-3009.

16-94-210. Accused to be informed of demand — Habeas corpus.

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding the person shall have appointed to receive the person unless he or she has been informed of the demand made for his or her surrender and of the crime with which he or she is charged and that he or she has the right to demand legal

counsel; and if the prisoner, his or her friends, or counsel shall state that he or she or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this state, who shall fix a reasonable time to be allowed the prisoner within which to apply for a writ of habeas corpus. And when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

History. Acts 1935, No. 126, § 10; Pope's Dig., § 6090; A.S.A. 1947, § 43-3010.

CASE NOTES

Analysis

Evidence.
Habeas corpus.

Evidence.

The Uniform Rules of Evidence do not apply to proceedings for extradition or rendition because the purpose of the extradition hearing is simply to determine whether the evidence of the fugitive's criminal conduct is sufficient to justify his extradition. Rivera v. State, 19 Ark. App. 100, 717 S.W.2d 493 (1986).

Unsworn statements of an absent witness may be considered in an extradition hearing as there is no inherent right to confrontation and cross-examination of witnesses. Rivera v. State, 19 Ark. App. 100, 717 S.W.2d 493 (1986).

Habeas Corpus.

Once the Governor has honored the requisition, the circuit court can consider a petition for habeas corpus for only two purposes — to establish the identity of the accused and to determine whether he is a fugitive. Rivera v. State, 19 Ark. App. 100, 717 S.W.2d 493 (1986).

16-94-211. Penalty.

Any officer who shall deliver to the agent for extradition of the demanding state a person in his or her custody under the Governor's warrant in disobedience to the last section shall be guilty of a misdemeanor, and on conviction shall be fined not more than one thousand dollars ($1,000) or be imprisoned not more than six (6) months, or both.

History. Acts 1935, No. 126, § 11; Pope's Dig., § 6091; A.S.A. 1947, § 43-3011.

16-94-212. Confining of accused in jail while en route.

The officer or person executing the Governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may when necessary confine the prisoner in the jail of any county or city through which he or she may pass; and the keeper of such jail must receive and safely keep the prisoner until the person having charge of him or her is ready to proceed on his or her route, such person being chargeable with the expense of keeping.

History. Acts 1935, No. 126, § 12; Pope's Dig., § 6092; A.S.A. 1947, § 43-3012.

16-94-213. Arrest prior to requisition.

Whenever any person within this state shall be charged on the oath of any credible person before any judge or other magistrate of this state with the commission of a crime in any other state, and, except in cases arising under § 16-94-206, with having fled from justice; or whenever complaint shall have been made before any judge or other magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and except in cases arising under § 16-94-206, has fled therefrom and is believed to have been found in this state, the judge or magistrate shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed directing him or her to apprehend the person charged, wherever he or she may be found in this state, and bring him or her before the same or any other judge, court, or magistrate who may be convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit; and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History. Acts 1935, No. 126, § 13; Pope's Dig., § 6093; A.S.A. 1947, § 43-3013.

CASE NOTES

Civil Rights Violations.

Bail bondsman was not a state actor when he filed an affidavit requesting a plaintiff's arrest under this section and, therefore, was entitled to a judgment as a matter of law on claim that he deprived plaintiff of his civil rights, under § 16-123-105(c). Dean v. Olibas, 129 F.3d 1001 (8th Cir. 1997).

16-94-214. Arrest without warrant.

(a) The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one (1) year; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him or her under oath setting forth the ground for the arrest as in the last section; and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant.

(b) Notwithstanding any other law to the contrary, a law enforcement officer shall deliver a person in custody to the accredited agent or agents of a demanding state without the Governor's warrant provided that:

(1) Such person is alleged to have broken the terms of his or her probation, parole, bail or any other release of the demanding state; and

(2) The law enforcement agency has received from the demanding state an authenticated copy of a prior waiver of extradition signed by such person as a term of his or her probation, parole, bail or any other release of the demanding state. The copy shall contain photographs, fingerprints or other evidence properly identifying such person as the person who signed the waiver.

History. Acts 1935, No. 126, § 14; Pope's Dig., § 6094; A.S.A. 1947, § 43-3014; Acts 1995, No. 556, § 1.

Cross References. Authority to arrest without warrant, ARCrP 4.1.

CASE NOTES

Cited: Cadle v. Cauthron, 266 Ark. 419, 584 S.W.2d 6 (1979).

16-94-215. Jailing of accused by magistrate.

If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and that he or she probably committed the crime, and, except in cases arising under § 16-94-206, that he or she has fled from justice, the judge or magistrate must commit him or her to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in the next section, or until he or she shall be legally discharged.

History. Acts 1935, No. 126, § 15; Pope's Dig., § 6095; A.S.A. 1947, § 43-3015.

Cross References. Procedure for pretrial release of arrested persons, ARCrP 8.1 et seq.

16-94-216. Bail.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, the judge or magistrate must admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as the judge or magistrate deems proper, for the prisoner's appearance before the judge or magistrate at a time specified in such bond or undertaking, and for the prisoner's surrender, to be arrested upon the warrant of the Governor of this state.

History. Acts 1935, No. 126, § 16; Pope's Dig., § 6096; A.S.A. 1947, § 43-3016.

CASE NOTES

Time.

Accused had the right to be taken before a magistrate and to have bail fixed at any time prior to the issuance of the Governor's warrant; however, after the issuance of the Governor's warrant, the only proceeding available to an accused in an extradition proceeding was by petition for a writ of habeas corpus, and the only matters for the court to consider in such case were the identity of the accused and if he was a fugitive. Cadle v. Cauthron, 266 Ark. 419, 584 S.W.2d 6 (1979).

16-94-217. Discharge of warrant.

If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant, bond, or undertaking, the judge or magistrate may discharge the accused or may recommit the accused to a further day, or may again take bail for his or her appearance and surrender, as provided in § 16-94-216; and at the expiration of the second period of commitment, or if the accused has been bailed and appeared according to the terms of his or her bond or undertaking, the judge or magistrate may either discharge the prisoner, or may require the prisoner to enter into a new bond or undertaking, to appear and surrender himself or herself at another day.

History. Acts 1935, No. 126, § 17; Pope's Dig., § 6097; A.S.A. 1947, § 43-3017.

16-94-218. Forfeiture of bond.

If the prisoner is admitted to bail and fails to appear and surrender himself or herself according to the condition of his or her bond, the court by proper order shall declare the bond forfeited; and recovery may be had thereon in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

History. Acts 1935, No. 126, § 18; Pope's Dig., § 6098; A.S.A. 1947, § 43-3018.

16-94-219. Criminal prosecution in this state.

If a criminal prosecution has been instituted against the person under the laws of this state and is still pending, the Governor at his or her discretion either may surrender him or her on the demand of the executive authority of another state or may hold him or her until the person has been tried and discharged or convicted and punished in this state.

History. Acts 1935, No. 126, § 19; Pope's Dig., § 6099; A.S.A. 1947, § 43-3019.

16-94-220. Pertinence of guilt or innocence of accused.

The guilt or innocence of the accused as to the crime of which he or she is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime.

History. Acts 1935, No. 126, § 20; Pope's Dig., § 6100; A.S.A. 1947, § 43-3020.

CASE NOTES

ANALYSIS

Proof of identity.
Res judicata.

Proof of Identity.

Proof of identity held sufficient. Stuart v. Johnson, 192 Ark. 757, 94 S.W.2d 715 (1936).

Res Judicata.

The discharge of a prisoner in a sister state in a habeas corpus proceeding under extradition on ground that the prisoner was not identified is not res judicata in subsequent similar proceedings in Arkansas in which the identity of the prisoner was established. Letwick v. State, 211 Ark. 1, 198 S.W.2d 830 (1947).

16-94-221. Recall of warrant or issuance of alias.

The Governor may recall his or her warrant of arrest or may issue another warrant whenever he or she deems proper.

History. Acts 1935, No. 126, § 21; Pope's Dig., § 6101; A.S.A. 1947, § 43-3021.

16-94-222. Issuance of warrant for fugitives from this state.

Whenever the Governor of this state shall demand a person charged with crime in this state from the chief executive of any other state, or from the Chief Justice or an Associate Justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he or she shall issue a warrant under the seal of this state, to some agent, commanding him or her to receive the person so charged if delivered to him or her and convey him or her to the proper officer of the county in this state in which the offense was committed.

History. Acts 1935, No. 126, § 22; Pope's Dig., § 6102; A.S.A. 1947, § 43-3022.

16-94-223. Obtaining Governor's requisition.

When the return to this state of a person charged with crime in this state is required, the prosecuting attorney (of the county in which the

offense is committed) shall present to the Governor his or her written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him or her, and the approximate time, place, and circumstances of its committal, the state in which he or she is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two (2) certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged. The prosecuting officer may also attach such further affidavits and other documents in duplicate as he or she shall deem proper to be submitted with such application. One (1) copy of the application with the action of the Governor indicated by endorsement thereon, and one (1) of the certified copies of the indictment or complaint or information and affidavit, shall be filed in the office of the Secretary of State to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition.

History. Acts 1935, No. 126, § 23; Pope's Dig., § 6103; A.S.A. 1947, § 43-3023.

16-94-224. Expenses.

When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the State Treasury, on the certificate of the Governor and warrant of the Auditor of State; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and not exceeding .... cents a mile for all necessary travel in returning such prisoner.

History. Acts 1935, No. 126, § 24; Pope's Dig., § 6104; A.S.A. 1947, § 43-3024.

16-94-225. Immunity from service of process.

A person brought into this state on extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he or she is returned, until he or she has been convicted in the criminal proceeding, or if acquitted, until he or she has had ample opportunity to return to the state from which he or she was extradited.

History. Acts 1935, No. 126, § 25; Pope's Dig., § 6105; A.S.A. 1947, § 43-3025.

16-94-226. Trial for other crimes.

After a person has been brought back to this state upon extradition proceedings, he or she may be tried in this state for other crimes which he or she may be charged with having committed here, as well as that specified in the requisition for his or her extradition.

History. Acts 1935, No. 126, § 26; Pope's Dig., § 6106; A.S.A. 1947, § 43-3026.

16-94-227. Construction.

This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History. Acts 1935, No. 126, § 27; Pope's Dig., § 6107; A.S.A. 1947, § 43-3027.

16-94-228. Separability.

If any part of this subchapter is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this subchapter.

History. Acts 1935, No. 126, § 28; A.S.A. 1947, § 43-3027n.

16-94-229. Repealer.

All acts or parts of acts and administrative rules inconsistent with this subchapter are hereby repealed.

History. Acts 1935, No. 126, § 29; A.S.A. 1947, § 43-3027n.

16-94-230. Title.

This subchapter may be cited as the "Uniform Criminal Extradition Act."

History. Acts 1935, No. 126, § 30; A.S.A. 1947, § 43-3028.

16-94-231. Effective date.

Whereas, under the present laws there is no effective way whereby the extradition of criminals may be effectively had; and,

Whereas, it is necessary for the preservation of the public peace, health and safety for an efficient statute covering the subject of extradition of criminals, an emergency is hereby declared and this subchapter shall take effect and be in force from and after its approval.

History. Acts 1935, No. 126, § 31; A.S.A. 1947, § 43-3028n.

Publisher's Notes. Acts 1935, No. 126, was signed by the Governor on March 19, 1935.

CHAPTER 95

INTERSTATE AGREEMENT ON DETAINERS

SECTION.
16-95-101. Agreement on Detainers.
16-95-102. "Appropriate court."
16-95-103. Enforcement.
16-95-104. Applicability of habitual offenders law.
16-95-105. Escape — Penalty.
16-95-106. Surrender of inmates.
16-95-107. Administration.

Effective Dates. Acts 1971, No. 705, § 11: Apr. 28, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that prosecuting authorities in this State do not now have adequate means by which to secure prisoners incarcerated in other jurisdictions for trial before the expiration of their sentences; that prosecuting officials of other states face an equal problem of securing prisoners incarcerated in this State for trial before the expiration of their sentences; and that it is in the immediate public interest that the State of Arkansas join with other states in the establishment of lawful procedures for the clearing of detainers, thereby expediting the enforcement of criminal laws of this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 21 Am. Jur. 2d, Crim. L., § 544 et seq.

Ark. L. Rev. Conflict of Laws: Arkansas, 32 Ark. L. Rev. 1.

Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191.

Leflar, Conflict of Laws: Arkansas, 1983-87, 41 Ark.L.Rev. 63.

16-95-101. Agreement on Detainers.

The Agreement on Detainers is enacted into law and entered into by the State of Arkansas with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints, and difficulties in securing speedy trial of persons already incarcerated

in other jurisdictions produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he or she initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article III or Article IV thereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he or she shall be brought to trial within one hundred eighty (180) days after he or she shall have caused to be delivered to the prosecuting officer's jurisdiction written notice of the place of his or her imprisonment and his or her request for a final disposition to be made of the indictment, information, or complaint; provided that for good cause shown in open court, the prisoner or his or her counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him or her, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him or her of the source and contents of any detainer lodged against him or her and shall also inform him or her of his or her right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him or her, after completion of his or her term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his or her body in any court where his or her presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his or her execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he or she has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate author-

ities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded, and transmitted the request: and provided further that there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his or her own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving states who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his or her counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he or she may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the

appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one (1) or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his or her attendance at court and while being transported to or from any place at which his or her presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run, but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state, and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one (1) or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and

shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction in the matter.

(b) No provisions of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be

held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History. Acts 1971, No. 705, § 1; A.S.A. 1947, § 43-3201.

Cross References. Prosecutor's obligations, ARCrP 29.1.

CASE NOTES

Analysis

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In General.

The Interstate Agreement on Detainers amounts to nothing more than a statutory set of procedural rules which do not rise to the level of constitutionally guaranteed rights. Camp v. United States, 587 F.2d 397 (8th Cir. 1978); Finley v. State, 295 Ark. 357, 748 S.W.2d 643 (1988).

Construction.

While the agreement should be liberally construed, this does not mean that courts are free to bend the legislation out of shape or to remold it to some other form. Phillips v. State, 15 Ark. App. 372, 695 S.W.2d 388 (1985).

Defendant erroneously claimed that, under Article IV(e) of this section, an Arkansas county circuit court lost jurisdiction of a capital felony murder charge against him after his trial was declared a mistrial and he was returned to federal prison; that reading of this section was clearly distorted since this section merely provides that an indictment, information, or complaint is invalidated only where a criminal defendant is not brought to trial at all on pending state charges before he is returned to federal custody. Hutcherson v. State, 316 Ark. 551, 873 S.W.2d 164 (1994).

Purpose.

Sanctions contained in Art. IV(e) are intended to prevent excessive interference with a prisoner's rehabilitation in the state prisoner system. Camp v. United States, 587 F.2d 397 (8th Cir. 1978); Finley v. State, 295 Ark. 357, 748 S.W.2d 643 (1988).

This subchapter is designed to standardize interstate rendition procedures in order to protect the inmate's right to speedy trial and reduce any uncertainties which might obstruct programs of prisoner treatment and rehabilitation. Padilla v. State, 279 Ark. 100, 648 S.W.2d 797 (1983).

This act deals specifically with ensuring that prisoners with pending charges in other states are protected from speedy trial violations. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

Applicability.

A detainer that was issued due to a previous conviction, and not due to pending charges, is not subject to this Act. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

Once a prisoner is released on parole, he or she is no longer in the class of prisoners covered by the Interstand Agreement on Defenses (IAD). Cunningham v. State, 341 Ark. 99, 14 S.W.3d 869 (2000).

Where defendant was returned to Arkansas after waiving extradition, the Interstate Agreements on Detainers was never triggered; extraditions are governed by the Uniform Criminal Extradition Act, § 16-94-201 et seq. Gondolfi v. Clinger, 352 Ark. 156, 98 S.W.3d 812 (2003).

Because defendant plead nolo contendere on the charges underlying the original sentence of probation, there was nothing "untried" within the meaning of the Interstate Agreement on Detainers (IAD), § 16-95-101 et seq.; a charge of violating the terms of a suspended sentence was not an untried indictment within the scope of

the meaning of the IAD and was inapplicable and, even if the court found that the IAD did apply, defendant made no demand for trial in compliance with the statute. Lindsey v. State, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 396 (May 26, 2004).

Detainer.

The Interstate Agreement on Detainers Act itself contains no definition of the word "detainer." Finley v. State, 295 Ark. 357, 748 S.W.2d 643 (1988).

Defined generally, a detainer is the restraint of a man's personal liberty against his will. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

For purposes of this act, a detainer is a notification filed with the institution in which a prisoner is serving a sentence advising that he is wanted to face criminal charges in another jurisdiction. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

The state's notifying federal authorities that defendant should be returned to Arkansas custody after completion of his federal sentence was not a detainer as defined by this chapter. Harper v. State, 315 Ark. 195, 865 S.W.2d 647 (1993).

A detainer is placed on a prisoner in another jurisdiction for purposes of having that prisoner return to the claiming jurisdiction to stand trial on pending charges; the definition does not include a notice that the prisoner has a sentence to serve in a foreign jurisdiction. Harper v. State, 315 Ark. 195, 865 S.W.2d 647 (1993).

Dismissal of Charges.

Evidence showed defendant held not deprived of his right to a speedy trial by the court's refusal to grant the motion to dismiss charges. Curan v. State, 260 Ark. 461, 541 S.W.2d 923, cert. denied, 434 U.S. 843, 98 S. Ct. 144, 54 L. Ed. 2d 108 (1976).

Any violation of Article III does not automatically require dismissal of the charges and release of a habeas corpus petitioner for the petitioner must not only show a clear violation of the statute but also that he was prejudiced as a direct result of the violation. Young v. Mabry, 471 F. Supp. 553 (E.D. Ark. 1978), aff'd, 596 F.2d 339 (8th Cir.), cert. denied, 444 U.S. 853, 100 S. Ct. 107, 62 L. Ed. 2d 69 (1979).

Defendant was not entitled to dismissal pursuant to Article III(d) as a result of being returned to federal custody before the charge against him was disposed of. Derring v. State, 273 Ark. 347, 619 S.W.2d 644 (1981).

Mandamus.

Where the sheriff issued a detainer, the fact that there was not a statute that specifically granted the sheriff the authority to issue detainers did not show the specific legal right required for a writ of mandamus to issue. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

Nonparty States.

Defendant, tried after expiration of 180 days from request for trial, could not assert that there was a violation of his statutory rights where the state of incarceration was not a party to the interstate agreement. Young v. State, 254 Ark. 72, 491 S.W.2d 789 (1973).

Request for speedy trial held ineffective because the arresting state had not adopted the statute and hence was not a party to the interstate agreement. Smith v. State, 258 Ark. 533, 528 S.W.2d 359 (1975).

Claim by prisoner in federal custody arising under this section as it operates in conjunction with the federal enactment of the agreement was a claim arising under the laws of the United States within the meaning of 28 U.S.C. § 2254; it was of no consequence that the state where the U.S. Penitentiary was located was not a party to the agreement since that state was never a custodial state within the meaning of this subchapter. Young v. Mabry, 471 F. Supp. 553 (E.D. Ark. 1978), aff'd, 596 F.2d 339 (8th Cir.), cert. denied, 444 U.S. 853, 100 S. Ct. 107, 62 L. Ed. 2d 69 (1979).

Speedy Trial.

The speedy trial provisions in the Interstate Agreement on Detainers (IAD) Act are nonjurisdictional and waivable. Finley v. State, 295 Ark. 357, 748 S.W.2d 643 (1988).

Time Limitations.

—Demand by Officer.

The defendant's time limit in this chapter was never triggered where the state never filed a detainer and the defendant was never served with a detainer while

incarcerated in another state. Durdin v. State, 59 Ark. App. 207, 955 S.W.2d 912 (1997).

—Demand by Prisoner.

This section cannot stand where no demand for trial was ever made in compliance with Art. III(a). Walker v. State, 263 Ark. 485, 565 S.W.2d 605 (1978).

Date of receipt of notice by the prosecuting authorities triggers the 180-day running of the statutory period; the key word in the statutory language is "delivered" and, comporting with the purpose of the notice provision, the term would have little meaning if something other than the receipt of the notice were contemplated inasmuch as the state authorities are bound to act within 180 days toward bringing the prisoner to trial in the receiving jurisdiction and to abrogate the uncertainties of the pending charges against the prisoner. Young v. Mabry, 471 F. Supp. 553 (E.D. Ark. 1978), aff'd, 596 F.2d 339 (8th Cir.), cert. denied, 444 U.S. 853, 100 S. Ct. 107, 62 L. Ed. 2d 69 (1979).

There is a positive duty upon a prisoner to seek a trial after he is notified that charges are pending; an accused in prison in another state, for a different crime, must affirmatively request trial in order to activate the speedy trial rule or statute. Dukes v. State, 271 Ark. 674, 609 S.W.2d 924 (1981).

Where defendant made no demand for trial in compliance with Article III(a), there was no violation of the time limit in this chapter. Patterson v. State, 318 Ark. 358, 885 S.W.2d 667 (1994).

Tolling.

The statutory time limits should be tolled during those periods when a prisoner is removed from the custodial place of incarceration and taken to another jurisdiction, other than the demanding jurisdiction, to stand trial on charges pending there. Young v. Mabry, 471 F. Supp. 553 (E.D. Ark. 1978), aff'd, 596 F.2d 339 (8th Cir.), cert. denied, 444 U.S. 853, 100 S. Ct. 107, 62 L. Ed. 2d 69 (1979).

Tolling provision of Article VI(a) held applicable. Young v. Mabry, 596 F.2d 339 (8th Cir.), cert. denied, 444 U.S. 853, 100 S. Ct. 107, 62 L. Ed. 2d 69 (1979).

Failure to accord a timely trial, as required by Art. III(a), may mandate dismissal of the untried charge; however, the time limits are tolled during the periods when the prisoner is removed from the custodial place of incarceration to a place other than the demanding jurisdiction. Spears v. State, 280 Ark. 577, 660 S.W.2d 913 (1983).

Untried Indictment.

Charge of violation of probation, absent an allegation of the commission of an indictable offense, is not an "untried indictment, information, or complaint" within the scope and meaning of Article III(a). Padilla v. State, 279 Ark. 100, 648 S.W.2d 797 (1983).

A probation revocation proceeding does not involve "untried" matters within the purview of Article III(a). Padilla v. State, 279 Ark. 100, 648 S.W.2d 797 (1983).

The 180-day time limitation contained in Article III(a) is triggered only when a prisoner has complied with the requirements of the article. Phillips v. State, 15 Ark. App. 372, 695 S.W.2d 388 (1985).

Defendant failed to substantially meet the necessary requirements of the agreement and, therefore, the 180-day time limitation was never activated. Phillips v. State, 15 Ark. App. 372, 695 S.W.2d 388 (1985).

Waiver.

Violation of Art. IV(e) by the United States was a nonjurisdictional error waivable by a criminal defendant. Camp v. United States, 587 F.2d 397 (8th Cir. 1978).

Cited: State v. Davidson, 254 Ark. 172, 492 S.W.2d 246 (1973); Young v. Arkansas, 533 F.2d 1079 (8th Cir. 1976); Grooms v. State, 260 Ark. 879, 545 S.W.2d 610 (1977); Underwood v. Pritchard, 638 F.2d 60 (8th Cir. 1981); Blackmon v. Weber, 277 Ark. 393, 642 S.W.2d 294 (1982); Dukes v. Lockhart, 769 F.2d 504 (8th Cir. 1985); Marshall v. State, 289 Ark. 462, 712 S.W.2d 894 (1986).

16-95-102. "Appropriate court."

The phrase "appropriate court" as used in the Agreement on Detainers shall, with reference to the courts of this state, mean any and all courts having jurisdiction over criminal matters.

History. Acts 1971, No. 705, § 2; A.S.A. 1947, § 43-3202.

16-95-103. Enforcement.

All courts, departments, agencies, officers, and employees of this state and its political subdivisions are directed to enforce the Agreement on Detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

History. Acts 1971, No. 705, § 3; A.S.A. 1947, § 43-3203.

16-95-104. Applicability of habitual offenders law.

Nothing in this chapter shall be construed to require the application of any habitual offenders law to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of the Agreement on Detainers.

History. Acts 1971, No. 705, § 4; A.S.A. 1947, § 43-3204.

16-95-105. Escape — Penalty.

Any prisoner who shall escape from custody while in another state or jurisdiction pursuant to the Agreement on Detainers shall be guilty of a felony and upon conviction shall be sentenced to a term of not less than three (3) years nor more than five (5) years in the state penitentiary.

History. Acts 1971, No. 705, § 5; A.S.A. 1947, § 43-3205.

16-95-106. Surrender of inmates.

It shall be lawful and mandatory upon the superintendent or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the Agreement on Detainers.

History. Acts 1971, No. 705, § 6; A.S.A. 1947, § 43-3206.

16-95-107. Administration.

The Director of the Department of Correction is designated and authorized to serve as central administrator of, and information agent for, the Agreement on Detainers.

History. Acts 1971, No. 705, § 7; A.S.A. 1947, § 43-3207.

Publisher's Notes. Acts 1971, No. 705, § 8, provided that copies of this chapter would, upon its approval, be transmitted to the governor of each state, the

Attorney General, and the Administrator of General Services of the United States, and the Council of State Governments.

CHAPTER 96

PROCEEDINGS IN INFERIOR COURTS

SUBCHAPTER.

1. City Courts.
2. Justice of the Peace Courts.[Repealed.]
3. Bond for Costs.[Repealed.]
4. Fines, Penalties, and Forfeitures.
5. Appeals to Circuit Court.

RESEARCH REFERENCES

Ark. L. Rev. Arkansas' Judiciary: Its History and Structure, 18 Ark. L. Rev. 152.

Criminal Procedure: A Survey of Arkansas Law and the American Bar Association's Standards, 26 Ark. L. Rev. 169.

Subchapter 1 — City Courts

SECTION.

16-96-101. Procedure generally.
16-96-102. Applicability to judge acting as clerk.
16-96-103. Terms of sessions.
16-96-104. Pleadings and indictments.
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16-96-108. Right to speedy trial or bail.
16-96-109. Time of trial.
16-96-110. Trial by judge or jury for violations of other than ordinances.
16-96-111. [Repealed.]
16-96-112. Trials in city court.
16-96-113. Continuances.

Cross References. District courts, § 16-17-101 et seq.

Territorial jurisdiction of certain courts generally, § 16-88-105.

Effective Dates. Acts 1885, No. 67, § 7: effective on passage.

Acts 1897 (Ex. Sess.), No. 24, § 4: effective on passage.

Acts 1935, No. 43, § 2: Feb. 16, 1935.

16-96-101. Procedure generally.

The proceedings in circuit courts for the trial of criminal cases, so far as applicable, shall govern the proceedings of the city courts, except as otherwise provided in this subchapter.

History. Crim. Code, § 310; C. & M. Dig., § 3287; Pope's Dig., § 4135; A.S.A. 1947, § 44-102.

CASE NOTES

Cited: Fortune v. Incorporated Town of Wilburton, 142 F. 114 (8th Cir. 1905); Cherry v. State, 347 Ark. 606, 66 S.W.3d 605 (2002).

16-96-102. Applicability to judge acting as clerk.

Where a judge acts as the clerk of the court, the provisions of this subchapter as to the clerk shall apply to him or her.

History. Crim. Code, § 313; C. & M. Dig., § 3296; Pope's Dig., § 4144; A.S.A. 1947, § 44-103.

16-96-103. Terms of sessions.

The judge of the city court may, by orders entered on its minutes, fix terms for its sessions, to which process shall be returnable, but may hold the court at any time for the transaction of business brought before him or her.

History. Crim. Code, § 301; C. & M. Dig., § 3284; Pope's Dig., § 4132; A.S.A. 1947, § 44-101.

Publisher's Notes. This section may be affected by § 16-18-102.

16-96-104. Pleadings and indictments.

(a) No written information or pleadings are required in prosecutions in which an indictment is not required.

(b) No indictment shall be necessary in prosecutions for violations of the bylaws or ordinances of a city or town nor in other prosecutions in city courts.

History. Crim. Code, §§ 300, 311; C. & M. Dig., §§ 3285, 3286; Pope's Dig., §§ 4133, 4134; A.S.A. 1947, §§ 44-104, 44-105; Acts 2005, No. 1994, § 279.

Amendments. The 2005 amendment deleted "police or" preceding "city courts" in (b).

CASE NOTES

Analysis

Bylaws or ordinances.
Traffic laws.

Bylaws or Ordinances.

No written information or pleadings are required in prosecutions for violation of bylaws or ordinances of a city or town. McConnell v. City of Booneville, 123 Ark. 561, 186 S.W. 82 (1916).

Traffic Laws.

Inasmuch as a shopping center parking lot was not a highway, a defendant whose car collided with another vehicle as defendant was pulling out of a parking space could not be charged with the violation of failure to yield right-of-way. Hartson v. City of Pine Bluff, 270 Ark. 748, 606 S.W.2d 149 (1980).

16-96-105. Summons.

(a) Upon information given by a peace officer, or by a private person on oath, to the judge or clerk of a court that an offense within the

jurisdiction of the court has been committed, the judge or clerk shall issue a summons against the offender.

(b)(1) The summons shall command the peace officer to whom it is directed to summon the defendant, naming him or her, to appear in the court, on a day to be named in the summons, to answer the charge made against him or her of having committed an offense, naming or briefly describing it, and the peace officer shall return the summons on a day to be named.

(2) It shall be signed by the judge or clerk and directed to the peace officer of the town or city, but it may be executed by any peace officer of the city or county.

(c) The summons shall be executed by the officer reading it to the defendant or stating to him or her its contents; and, if required, the officer shall show it to him or her.

History. Crim. Code, §§ 303, 304, 307; C. & M. Dig., §§ 3291, 3292, 3294; Pope's Dig., §§ 4139, 4140, 4142; A.S.A. 1947, §§ 44-106, 44-107, 44-109.

16-96-106. Warrant of arrest.

Upon information on oath made to the judge of the court, he or she may order a warrant of arrest to be issued, which shall be similar to the summons except in the command to arrest the defendant instead of summon him or her.

History. Crim. Code, § 305; C. & M. Dig., § 3293; Pope's Dig., § 4141; A.S.A. 1947, § 44-108.

16-96-107. Subpoenas.

The clerk shall issue subpoenas for witnesses at the request of the officers of the city or of the defendant, and the court may compel their attendance in the manner prescribed in the Civil Code.

History. Crim. Code, § 308; C. & M. Dig., § 3295; Pope's Dig., § 4143; A.S.A. 1947, § 44-110.

Publisher's Notes. The Civil Code, referred to in this section, means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

16-96-108. Right to speedy trial or bail.

When a person has been arrested and brought before the city court, or the judge thereof, charged with an offense within the jurisdiction of the court, he or she shall be immediately tried or, at the discretion of the judge, held to bail for his or her future appearance for trial, or discharged from custody.

History. Crim. Code, § 302; C. & M. Dig., § 3297; Pope's Dig., § 4145; A.S.A. 1947, § 44-111.

16-96-109. Time of trial.

(a) All prosecutions in city courts shall stand for trial immediately, where the defendant is in custody or on bail for the offense charged, or on the day when the defendant has been summoned to appear, but only if the summons was executed within the limits of the court's jurisdiction one (1) day or, elsewhere, ten (10) days before the day on which he or she is warned to appear.

(b) If not executed as provided in subsection (a) of this section, the trial shall be postponed to a day to be fixed by the court.

History. Crim. Code, § 306; C. & M. Dig., § 3289; Pope's Dig., § 4137; A.S.A. 1947, § 44-112.

16-96-110. Trial by judge or jury for violations of other than ordinances.

The issues of law and of fact in cases for violations of other than ordinances may be tried by the judge unless the defendant demands a trial by jury, in which case the issues shall be tried by a jury of twelve (12) persons unless the defendant shall consent to be tried by a lesser number.

History. Crim. Code, § 312; Acts 1871, No. 49, § 1 [312]; p. 256; C. & M. Dig., § 3288; Pope's Dig., § 4136; A.S.A. 1947, § 44-114.

16-96-111. [Repealed.]

Publisher's Notes. This section, concerning trials in police court, was repealed by Acts 2005, No. 1994, § 553. The section was derived from Acts 1885, No. 67, § 4, p. 92; C. & M. Dig., § 7734; Pope's Dig., § 9930; A.S.A. 1947, § 44-115.

16-96-112. Trials in city court.

All trials in the city court for violation of the bylaws or ordinances of any city or incorporated town shall be before the judge without the intervention of a jury, but the defendant, upon appeal, shall have the right to a trial by jury in the circuit court.

History. Acts 1897 (Ex. Sess.), No. 24, § 2; C. & M. Dig., § 7685; Acts 1935, No. 43, § 1; Pope's Dig., § 9814; A.S.A. 1947, § 44-116.

16-96-113. Continuances.

The court may, for good cause, grant continuances or postponements of the trial.

History. Crim. Code, § 309; C. & M. Dig., § 3290; Pope's Dig., § 4138; A.S.A. 1947, § 44-113.

Subchapter 2 — Justice of the Peace Courts.

SECTION.
16-96-201 — 16-96-211. [Repealed.]

16-96-201 — 16-96-211. [Repealed.]

Publisher's Notes. This subchapter, regarding justice of the peace courts, was repealed by Acts 2005, No. 1994, § 554. The subchapter was derived from the following sources:

16-96-201. Crim. Code, § 324; C. & M. Dig., § 3299; Pope's Dig., § 4147; A.S.A. 1947, § 44-202.

16-96-202. Crim. Code, § 321; C. & M. Dig., § 3298; Pope's Dig., § 4146; A.S.A. 1947, § 44-201.

16-96-203. Crim. Code, §§ 317-319; C. & M. Dig., §§ 3315-3317; Pope's Dig., §§ 4163-4165; A.S.A. 1947, §§ 44-203 — 44-205.

16-96-204. Crim. Code, § 320; C. & M. Dig., § 3318; Pope's Dig., § 4166; A.S.A. 1947, § 44-206.

16-96-205. Crim. Code, § 316; C. & M. Dig., § 3314; Pope's Dig., § 4162; A.S.A. 1947, § 44-209.

16-96-206. Crim. Code, §§ 314, 315; C. & M. Dig., §§ 3312, 3313; Pope's Dig., §§ 4160, 4161; A.S.A. 1947, §§ 44-207, 44-208.

16-96-207. Crim. Code, §§ 322, 323; Acts 1871, No. 49, § 1 [322], p. 255; C. & M. Dig., §§ 3319, 3320; Pope's Dig., §§ 4167, 4168; A.S.A. 1947, §§ 44-210, 44-211.

16-96-208. Acts 1887, No. 25, §§ 1-5, p. 30; C. & M. Dig., §§ 3306-3310; Pope's Dig., §§ 4154-4158; A.S.A. 1947, §§ 44-212 — 44-216.

16-96-209. Acts 1893, No. 11, §§ 1-6, p. 16; C. & M. Dig., §§ 3300-3305; Pope's Dig., §§ 4148-4153; A.S.A. 1947, §§ 44-217 — 44-222.

16-96-210. Acts 1875, No. 61, §§ 1-3, p. 150; C. & M. Dig., §§ 2824-2826; Pope's Dig., §§ 3542-3544; A.S.A. 1947, §§ 44-223 — 44-225.

16-96-211. Acts 1953, No. 409, § 1; A.S.A. 1947, § 44-226.

Subchapter 3 — Bond for Costs.

SECTION.
16-96-301 —16-96-304. [Repealed.]

16-96-301 — 16-96-304. [Repealed.]

Publisher's Notes. This subchapter, regarding bond for costs, was repealed by Acts 2005, No. 1994, § 555. The subchapter was derived from the following sources:

16-96-301. Acts 1871, No. 31, § 6, p. 96; C. & M. Dig., § 3283; Pope's Dig., § 4130; A.S.A. 1947, § 44-304.

16-96-302. Acts 1871, No. 31, §§ 1, 4, p. 96; C. & M. Dig., §§ 3279, 3282; Pope's Dig., §§ 4127, 4131; A.S.A. 1947, §§ 44-301, 44-305.

16-96-303. Acts 1871, No. 31, § 2, p. 96; C. & M. Dig., § 3280; Pope's Dig., § 4128; A.S.A. 1947, § 44-302.

16-96-304. Acts 1871, No. 31, § 3, p. 96; C. & M. Dig., § 3281; Pope's Dig., § 4129; A.S.A. 1947, § 44-303.

Subchapter 4 — Fines, Penalties, and Forfeitures

SECTION.
16-96-401. Collection and payment.
16-96-402. [Repealed.]
16-96-403. Imposition by circuit court on appeal — Costs.

Preambles. Acts 1933, No. 148, contained a preamble which read: "Whereas, there is much confusion existing in this state, as to the disposition of fines and costs, in cases which have been appealed to the circuit court from the police courts and municipal courts of cities of the first class for the violation of municipal ordinances...."

Effective Dates. Acts 1883, No. 114, § 226: effective on passage.

Acts 1889, No. 101, § 4: effective on passage.

Acts 1933, No. 148, § 2: Mar. 24, 1933. Emergency clause provided: "That there is an emergency existing in this state because of the numerous crimes now being committed within the cities of the first class, and because of their depleted revenues such cities have not sufficient funds to protect their citizens from these crimes, all laws and parts of laws conflicting herewith are hereby repealed and this law will go into full force and effect from and after its approval."

Acts 1997, No. 788, § 36: became law without the Governor's signature. Noted Mar. 11, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the effectiveness of this act on July 1, 1997 is essential to the operation of the state court system, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental progress. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1997."

Acts 1997, No. 1341, § 35: became law without the Governor's signature. Noted Apr. 11, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the effectiveness of this act on July 1, 1997 is essential to the operation of the state court system, and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental progress. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1997."

16-96-401. Collection and payment.

(a) All justices of the peace are prohibited from collecting fines, penalties, and forfeitures.

(b) Quarterly on the first Mondays in July, October, January, and April, all constables or other collecting officers of any township shall turn over to the county treasurer of their respective counties all fines, penalties, and forfeitures, less the commission due the officers, which shall be three percent (3%) for constables on the amount collected by them, taking duplicate receipts therefor, one (1) of which shall be immediately filed with the clerk of the county court of their respective counties.

(c)(1) On or before the first Mondays of July, October, January, and April of each year, the clerks of the county courts shall audit the accounts of constables and other collecting officers referred to in subsection (b) of this section. To that end, the clerks of the county courts shall open a separate account with each of the officers in a book to be kept by the clerks for that purpose.

(2) They shall charge the collecting officer with the amount of fines, penalties, and forfeitures adjudged against defendants in justices or

other courts in the county, excepting only circuit courts, as shown by the transcript of the judicial officers on file in the offices of the clerks of the county courts.

(d) The clerks of the county courts shall further charge the county treasurer with all fines, penalties, and forfeitures turned over by constables and other collecting officers in pursuance of the provisions of this section.

(e)(1) The constables and other collecting officers shall not be credited with any deficits as to fines and penalties unless they shall be able to show the death of the party against whom the fine or penalty was adjudged or that imprisonment in default of the payment of fine has been complied with in accordance with the provisions of the criminal law.

(2) The constables and other collecting officers shall not be credited with any deficit on forfeited bail bonds or recognizances unless the return of the officer serving the execution in the case shall show that the defendant had no property subject to execution. In that case, a certified copy of the return shall be filed with the clerk of the county court by the officer charged with the collection.

(f)(1) At the commencement of each session of the circuit court of the clerk's county, the clerk of the county court shall furnish the prosecuting attorney with a written statement of all deficits of constables and other collecting officers on account of fines, penalties, and forfeitures.

(2) It shall be the duty of the prosecuting attorney to bring suit against the constables and collecting officers and their securities for the deficiency due and also to prosecute the officers by indictment for malfeasance in office.

History. Acts 1883, No. 114, §§ 213, 215-218, 221, p. 199; C. & M. Dig., §§ 10184, 10186-10189, 10192; Pope's Dig., §§ 13967, 13969-13972, 13975; A.S.A. 1947, §§ 44-401, 44-405 — 44-409; Acts 2005, No. 1994, § 325.

Amendments. The 2005 amendment, in (a), substituted "forfeitures" for "forfeitures, but that duty shall devolve upon sheriffs and constables exclusively."

CASE NOTES

Cited: Town of Hackett City v. State ex rel. Greenwood Dist., 56 Ark. 133, 19 S.W. 426 (1892').

16-96-402. [Repealed.]

Publisher's Notes. This section, concerning reports by justices of the peace, was repealed by Acts 2005, No. 1994, § 556. The section was derived from Acts 1889, No. 101, §§ 1-4, p. 142; C. & M. Dig., §§ 1405-1407; Pope's Dig., §§ 1668-1670; A.S.A. 1947, §§ 44-402 — 44-404, 44-404n.

16-96-403. Imposition by circuit court on appeal — Costs.

The fines, penalties, forfeitures, and costs imposed by a circuit court for offenses which are misdemeanors or violations under state law or local ordinance or for traffic offenses which are misdemeanors or violations under state law or local ordinance in cases appealed from any court of limited jurisdiction shall be collected and disbursed in the following manner:

(1) If the appeal proceeds to a de novo bench trial or jury trial, the fines, penalties, forfeitures, and costs imposed by the circuit court shall be collected pursuant to § 16-13-709 and paid to the county treasurer;

(2) If the defendant pleads guilty or nolo contendere or the circuit court dismisses the appeal, the judgment of the court from which the appeal originated shall be affirmed;

(i) The circuit court clerk shall notify in writing, within thirty (30) days of the affirmance or dismissal, the court from which the appeal originated of the affirmance or dismissal;

(ii) Upon receipt of the notice of affirmance or dismissal, the court from which the appeal originated shall collect and disburse the fines, penalties, forfeitures, and costs pursuant to §§ 16-10-209, 16-10-308, 16-17-707, 16-18-104, 14-44-108, and 14-45-106.

(3) Nothing in this section shall affect the right of a court of limited jurisdiction to require a supersedeas bond for an appeal to circuit court nor the ability of these courts to collect any fine, penalty, forfeiture, or costs imposed in the absence of a supersedeas bond.

History. Acts 1933, No. 148, § 1; Pope's Dig., § 11826; A.S.A. 1947, § 44-410; Acts 1995, No. 1252, § 1; 1997, No. 788, § 24; 1997, No. 1341, § 24; 1999, No. 1081, § 9; 2003, No. 1185, § 220; 2003, No. 1765, § 25.

Amendments. The 2003 amendment by No. 1185 substituted "any court of limited jurisdiction" for "the municipal, city or police courts of this state" in the introductory paragraph; substituted "court from which the appeal originated" for "municipal, city or police court" in the introductory paragraph of (2); substituted "court from which the appeal originated" for "municipal, city or police court" in (2)(ii); and substituted "a court of limited jurisdiction" for "municipal, city or police courts" in (3).

The 2003 amendment by No. 1765 substituted "any court of limited jurisdiction" for "the municipal, city or police courts of this state" in the introductory paragraph; substituted "court from which the appeal originated" for "municipal, city or police court" in the introductory paragraph of (2); inserted "notify in writing" and deleted "notify in writing the municipal, city or police" following the second occurrence of "dismissal" in (2)(i); in (2)(ii), substituted "court from which the appeal originated" for "municipal, city or police court" and substituted "§§ 16-10-209, 16-10-308, 16-17-707, 16-18-104, 14-44-108, and 14-45-106" for "§§ 16-17-707"; and substituted "a court of limited jurisdiction" for "municipal, city or police courts" in (3).

Cross References. Legislative intent of Acts 1997, No. 1341, § 16-10-601.

Legislative intent of Acts 1997, No. 788, § 16-10-601.

Transition to state funding, §§ 16-87-301 and 16-87-302.

Subchapter 5 — Appeals to Circuit Court

SECTION.
16-96-501. [Superseded.]

SECTION.
16-96-502. [Repealed.]

SECTION.
16-96-503. Jurisdiction.
16-96-504. [Repealed.]
16-96-505. [Superseded.]
16-96-506. Time of trial.
16-96-507. Trial de novo.
16-96-508. Judgment on default.
16-96-509. Judgment for defendant.
16-96-510. [Repealed.]

Effective Dates. Acts 1874, No. 18, § 2: effective on passage.

Acts 1881, No. 81, § 16: effective on passage.

Acts 1893, No. 33, § 4: effective on passage.

Acts 1905, No. 151, § 5: effective 90 days after passage.

Acts 1945, No. 197, § 4: approved Mar. 7, 1945. Emergency clause provided: "It is hereby ascertained that since the passage of Act Number 125 of the Acts of the General Assembly of the year 1943, which Act is hereby repealed, many persons who were not informed of their legal rights or of the meaning of pleas of guilty have suffered grave injustices because they have been induced to enter pleas of guilty when they were in fact innocent, or, though guilty of some minor crime, have been wrongfully punished by judgments upon pleas of guilty of much more serious crimes involving far greater punishment than the facts warranted.

"It is further ascertained that many such persons remained ignorant of their rights too long to apply to the circuit judge of the county where they were convicted to have him grant an appeal from such conviction and were therefore denied a trial of their case de novo in the circuit court.

"For the foregoing reasons and because it should be and is the policy of the law to promote justice by insuring that every person accused of crime be afforded a fair and impartial trial after being fully informed of the crime which he is charged and given an opportunity to prepare and present his defense on appeal to a competent court, an emergency is hereby declared to exist and this Act shall take effect and be in force from and after its passage."

16-96-501. [Superseded.]

Publisher's Notes. This section is superseded by Arkansas Inferior Court Rule 9. See Allred v. State, 310 Ark. 476, 837 S.W. 2d 469 (1992). The section was derived from Acts 1945, No. 197, § 2; A.S.A. 1947, § 44-502.

16-96-502. [Repealed.]

Publisher's Notes. This section, concerning the state having no right of appeal from judgments of justices' courts, was repealed by Acts 2005, No. 1994, § 557. The section was derived from Crim. Code, § 355, C. & M. Dig., § 3381; Pope's Dig., § 4224; A.S.A. 1947, § 44-503.

16-96-503. Jurisdiction.

The court shall have appellate jurisdiction over the judgments of city courts in their respective counties without regard to the amount in controversy.

History. Crim. Code, § 354; Acts 1874, No. 18, § 1, p. 61; C. & M. Dig., § 3380; Pope's Dig., § 4223; A.S.A. 1947, § 44-501; Acts 2005, No. 1994, § 280.

Amendments. The 2005 amendment deleted "justices' courts, and of police and" following "judgments of."

CASE NOTES

Corporation Courts.

Circuit courts have jurisdiction in appeals from corporation courts in both civil and criminal cases. Ullery v. Ft. Smith, 35 Ark. 214 (1879).

16-96-504. [Repealed.]

Amendments. This section, concerning appeal bond, was repealed by Acts 2005, No. 1994, § 558. The section was derived from Acts 1881, No. 81, § 7, p. 148; 1893, No. 33, § 2, p. 50; C. & M. Dig., § 3386; Pope's Dig., § 4229; A.S.A. 1947, § 44-508.

16-96-505. [Superseded.]

Publisher's Notes. This section is superseded by Arkansas Inferior Court Rule 9. See Bocksnick v. City of London, 308 Ark. 599, 825 S.W. 2d 267 (1992). The section was derived from Acts 1905, No. 151, § 2, p. 375; C. & M. Dig., § 3383; Pope's Dig., § 4226; A.S.A. 1947, § 44-505.

16-96-506. Time of trial.

All appeals to the circuit court in criminal cases shall stand for trial at any time after the transcript and papers are, or should have been, filed in the circuit court as provided in this subchapter.

History. Acts 1905, No. 151, § 3, p. 375; C. & M. Dig., § 3384; Pope's Dig., § 4227; Acts 1955, No. 68, § 1; A.S.A. 1947, § 44-506.

CASE NOTES

Analysis

In general.
Construction.
Purpose.
Notice.

In General.

Although litigants are free to utilize the same defense in circuit court asserted in the municipal court, they are not required to raise that same defense, nor is the trial in the circuit court to be influenced or affected by what occurred in the municipal court. Bussey v. State, 315 Ark. 292, 867 S.W.2d 433 (1993).

A case appealed to the circuit court is to be tried as though there had been no trial in the lower court. Bussey v. State, 315 Ark. 292, 867 S.W.2d 433 (1993).

Construction.

This section does not imply that there is no need to refile pleadings. Bussey v. State, 315 Ark. 292, 867 S.W.2d 433 (1993).

Purpose.

The purpose of the trial de novo is to conduct a trial as though there had been no trial in the lower court. Bussey v. State, 315 Ark. 292, 867 S.W.2d 433 (1993).

Notice.

The trial in circuit court should be treated as an entirely new trial, and notice given prior to the trial in municipal court was not applicable to a later trial de novo in circuit court. Bussey v. State, 315 Ark. 292, 867 S.W.2d 433 (1993).

Cited: Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967).

16-96-507. Trial de novo.

Upon the appeal, the case shall be tried anew as if no judgment had been rendered, and the judgment shall be considered as affirmed if a

judgment for any amount is rendered against the defendant, and thereupon he or she shall be adjudged to pay costs of the appeal.

History. Crim. Code, § 357; C. & M. Dig., § 3387; Pope's Dig., § 4230; A.S.A. 1947, § 44-509.

CASE NOTES

Analysis

Default judgment.
Discovery.
Error.
Failure to appear.
Former jeopardy.
Jury trial.
Lack of jurisdiction below.
Right to counsel.
Same offense.

Default Judgment.

A defendant has a direct right of appeal to circuit court from the entry of a default judgment in municipal court. Murdock v. Slater, 326 Ark. 1067, 935 S.W.2d 540 (1996).

Discovery.

Because a trial in circuit court is treated as an entirely new trial, appellant was required to refile a motion for discovery in order to prevent the state from being relieved of its duty to disclose. Smith v. State, 55 Ark. App. 97, 931 S.W.2d 792 (1996).

Error.

The defendant could not rely on an error in the municipal court as a ground for reversing judgment after he had received an entirely new trial in the circuit court, unaffected by the proceedings in the municipal court. Hogan v. State, 289 Ark. 402, 712 S.W.2d 295 (1986).

It was error for the circuit court to dismiss an appeal from the municipal court on its own motion without notice or prior hearing. Harrell v. City of Conway, 296 Ark. 247, 753 S.W.2d 542 (1988).

Even though the municipal court venue might have been erroneous, where the appellant does not question the fact that he received a fair trial with proper venue in circuit court, there is no basis for reversing the judgment of the circuit court. Griffin v. State, 297 Ark. 208, 760 S.W.2d 852 (1988).

Failure to Appear.

Court is not authorized to affirm the judgment on failure of the appellant to appear, but may, in its discretion, order him to be brought in on warrant, or may dismiss his appeal and order the justice to execute his judgment. Thomas v. State, 41 Ark. 408 (1883).

Former Jeopardy.

Appellant was not required to plead former jeopardy since record of the lower court was before the circuit court on appeal, and it showed an implied acquittal of the higher charge by a jury in the lower court. Strickbine v. State, 201 Ark. 1031, 148 S.W.2d 180 (1941).

Jury Trial.

Circuit court erred in overruling appellant's motion for a jury trial on her appeal from a fine for violating a municipal ordinance. Johnston v. City of Pine Bluff, 258 Ark. 346, 525 S.W.2d 76 (1975).

Lack of Jurisdiction Below.

Information filed in mayor's court is not demurrable because of lack of jurisdiction since the trial on appeal to the circuit court is de novo. Hill v. State, 174 Ark. 886, 298 S.W. 321 (1927).

Where a municipal court's exercise of its jurisdiction was erroneous, defendant was entitled to an entirely new trial before the circuit court, which was not deprived of jurisdiction to hear the matter de novo on appeal by the irregular municipal court proceeding. Killion v. City of Waldron, 260 Ark. 560, 542 S.W.2d 744 (1976); Stephens v. State, 295 Ark. 541, 750 S.W.2d 52 (1988).

In a prosecution for night hunting, the circuit court had jurisdiction to order forfeiture of a truck and shotgun, notwithstanding that the municipal court may not have had jurisdiction to do so. Crow v. State, 56 Ark. App. 100, 938 S.W.2d 874 (1997).

Right to Counsel.

Failure to assign counsel to an indigent

misdemeanor defendant in the justice of the peace and mayor's courts did not deprive him of his constitutional rights where, upon appeal to the circuit court, the causes were tried de novo and the defendant was represented by counsel. Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967).

Same Offense.

The accused must be tried in the circuit court, on appeal, for the same offense for which he was tried before the justice. Marre v. State, 36 Ark. 222 (1880); Thomas v. State, 41 Ark. 408 (1883).

Cited: Jaynes v. State, 212 Ark. 410, 206 S.W.2d 7 (1947); City of Star City v. Shepherd, 287 Ark. 188, 697 S.W.2d 113 (1985); Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989); Woodberry v. State, 35 Ark. App. 129, 811 S.W.2d 339 (1991); Sundeen v. Kroger, 355 Ark. 138, 133 S.W.3d 393 (2003).

16-96-508. Judgment on default.

If the appellant shall fail to appear in the circuit court when the case is set for trial or the judge or magistrate who tried the case shall fail to file the transcript and papers as provided in this subchapter and the appellant shall fail to appear and move the court for an order to compel the judge or magistrate to so file within the first three (3) days of the first term of the circuit court beginning more than ten (10) days after the appeal was prayed, then the circuit court may, unless good cause is shown to the contrary, affirm the judgment and enter judgment against the appellant for the same fine or penalty that was imposed in the court of limited jurisdiction, with costs. This judgment shall have the same force and effect as other judgments of the circuit court in cases of convictions or indictments for misdemeanors.

History. Acts 1905, No. 151, § 4, p. 375; C. & M. Dig., § 3385; Pope's Dig., § 4228; A.S.A. 1947, § 44-507; Acts 2005, No. 1994, § 281.

Amendments. The 2005 amendment substituted "judge or magistrate" for "justice or other magistrate" following "in the event that the," and "judge" for "justice" following "compel the," deleted "of the justice, police, or city court" following "affirm the judgment" and substituted "court of limited jurisidction, with costs" for "inferior court."

CASE NOTES

Analysis

Affirming judgment.
Dismissal improper.
Due process.
Good cause.
Setting case for trial.

Affirming Judgment.

When the accused fails to appear in circuit court for trial, the circuit court may, unless for good cause shown, affirm the judgment of a justice, police or city court. Jaynes v. State, 212 Ark. 410, 206 S.W.2d 7 (1947).

Evidence sufficient to show prejudicial error where circuit court summarily affirmed municipal court judgment, from which defendant was appealing, when defendant failed to appear in court on time. Prine v. State, 267 Ark. 304, 590 S.W.2d 25 (1979).

Circuit court has no authority to revoke the suspension of an affirmed sentence because of failure to appear and failure to pay costs. Wade v. State, 269 Ark. 685, 599 S.W.2d 764 (Ct. App. 1980).

Court did not abuse its discretion in refusing to hold the trial in defendant's absence, dismissing the appeal, and ordering that the municipal court sentence be put into execution because defendant failed to appear for trial. Whitmire v. State, 50 Ark. App. 34, 901 S.W.2d 20 (1995).

Dismissal Improper.

Dismissal of defendant's appeal on the grounds that his attorney failed to appear at a pretrial hearing was improper; where dismissal of the appeal from district court was not authorized by former § 16-96-508, the effect of the trial court's action was to deny defendant his right to a jury trial without the express waiver thereof required by the Arkansas Constitution. Ayala v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 658 (Sept. 28, 2005).

Due Process.

Due process dictates that appellant be afforded proper notice and an opportunity to be heard in a proceeding involving the deprivation of life, liberty, or property, and that interested parties as well as their attorneys receive notice from the clerk of the court of proceedings scheduled, and that time should be afforded counsel to prepare for trial. Rawls v. State, 266 Ark. 919, 587 S.W.2d 602 (Ct. App. 1979).

Where the defense attorney had two days notice before the trial date that the case would be reset for a day within ten days or two weeks and there was no reason shown for the attorney's stated inability to contact defendant in Iowa so that he could be present for trial, statutory and due process requirements were met. Whitmire v. State, 50 Ark. App. 34, 901 S.W.2d 20 (1995).

Good Cause.

Defendant did not show good cause for not showing up at trial where he claimed his attorney had rescheduled the trial by an agreement with the prosecutor as attorneys cannot vary a trial date set by the court. Rischar v. State, 307 Ark. 429, 821 S.W.2d 25 (1991).

Setting Case for Trial.

Evidence sufficient to constitute a setting of the case for trial within the meaning of this section. Renfro v. City of Conway, 260 Ark. 852, 545 S.W.2d 69 (1977).

Cited: Cableton v. State, 243 Ark. 351, 420 S.W.2d 534 (1967); Winkle v. State, 310 Ark. 713, 841 S.W.2d 589 (1992); Cagle v. State, 47 Ark. App. 1, 882 S.W.2d 674 (1994); Ibsen v. Plegge, 341 Ark. 225, 15 S.W.3d 686 (2000).

16-96-509. Judgment for defendant.

If judgment is rendered for the defendant, any money paid into the circuit court which has been collected from the defendant on the original judgment shall be forthwith returned to the defendant.

History. Crim. Code, § 359; C. & M. Dig., § 3389; Pope's Dig., § 4232; A.S.A. 1947, § 44-511.

CASE NOTES

Repayment of Funds.

Defendant was entitled to repayment of funds where he had paid the fine and costs related to his 1988 conviction in municipal court; the trial court's order of dismissal set aside the 1988 conviction and constituted a judgment rendered for the defendant under this section and, as such, any money paid by defendant into the circuit court that was collected on the original judgment should have been forthwith returned to him. Donald v. City of W. Memphis, 84 Ark. App. 90, 133 S.W.3d 410 (2003).

16-96-510. [Repealed.]

Publisher's Notes. This section, concerning attorney's fees, was repealed by Acts 2005, No. 1994, § 559. The section was derived from Crim. Code, § 358; C. & M. Dig., § 3388; Pope's Dig., § 4231; A.S.A. 1947, § 44-510.

CHAPTER 97

SENTENCING

SECTION.
16-97-101. Bifurcated sentencing procedures.
16-97-102. Sentencing by the court.
16-97-103. Evidence.
16-97-104. Proof of prior convictions.

A.C.R.C. Notes. Acts 1993, Nos. 535 and 551, § 7, provided: "The bifurcation procedures in Sections 1 and 2 of this act [codified as § 5-4-103 and §§ 16-97-101 — 16-97-104] shall become effective on January 1, 1994 and shall expire on June 30, 1997."

Acts 1995, No. 892, § 1, provided: "The uncodified Section 7 of Act 551 of 1993 which sunsets the bifurcated sentencing procedures in Arkansas Code Annotated §§ 5-4-103, 16-97-101, 16-97-102, 16-97-103, and 16-97-104 is repealed."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Procedure, 16 UALR L.J. 99.

CASE NOTES

ANALYSIS

Constitutionality.
Construction.

Constitutionality.

Arkansas's new bifurcated sentencing laws did not violate the Ex Post Facto Clause because they did not criminalize conduct that was previously non-criminal, did not increase the severity or harshness of the punishment for the offenses that defendant committed, and did not deprive defendant of a defense that was available to him at the time he committed the offenses with which he was charged; because the penalty or sentence authorized under the prior and new sentencing statutes remains the same as applied in defendant's situation, any change was merely procedural and not substantively prejudicial or an ex post facto violation. Williams v. State, 318 Ark. 846, 887 S.W.2d 530 (1994).

Where, on the first day of trial, the trial court conducted a proceeding under the heading of "Bill of Exceptions" in which witnesses and other trial-related matters were discussed at length and defendant had ample opportunity to make any motions, and where defendant elected to wait until the second day of trial to file his motion concerning the constitutionality of Acts 1993, Nos. 535 and 551, and alerted the court of its pendency only on the third day of trial, because an issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal, the motion in question was untimely. Watkins v. State, 320 Ark. 163, 895 S.W.2d 532 (1995).

Construction.

Acts 1993, No. 535, which is codified in part as this chapter, provided, in part, that all laws in conflict with the act were repealed, thus repealing section 16-91-101(c). Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Section 16-97-101, which provides for sentencing by a jury after a plea of guilty under certain conditions, is not repugnant to ARCrP 36.1 [superseded], which provides in part that, except as provided by ARCrP 24.3(b), there shall be no appeal from a plea of guilty or nolo contendere; the statute is to stand as compatible with the rule, recognizing that the legislature has provided not only for separate and distinct procedures governing jury trials and sentencing by jury but for evidentiary matters as well. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Cited: Williams v. State, 325 Ark. 432, 930 S.W.2d 297 (1996).

16-97-101. Bifurcated sentencing procedures.

The following procedure shall govern jury trials which include any felony charges:

(1) The jury shall first hear all evidence relevant to every charge on which a defendant is being tried and shall retire to reach a verdict on each charge;

(2) If the defendant is found guilty of one (1) or more charges, the jury shall then hear additional evidence relevant to sentencing on those charges. Evidence introduced in the guilt phase may be considered, but need not be reintroduced at the sentencing phase;

(3) Following the introduction of additional evidence relevant to sentencing, if any, instruction on the law, and argument, the jury shall again retire and determine a sentence within the statutory range;

(4) The court, in its discretion, may also instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify. The jury, in its discretion, may make a recommendation as to an alternative sentence. However, this recommendation shall not be binding on the court;

(5) After a jury finds guilt, the defendant, with the agreement of the prosecution and the consent of the court, may waive jury sentencing, in which case the court shall impose sentence; and

(6) After a plea of guilty, the defendant, with the agreement of the prosecution and the consent of the court, may be sentenced by a jury impaneled for purposes of sentencing only.

History. Acts 1993, No. 535, § 2; 1993, No. 551, § 2.

A.C.R.C. Notes. Acts 1995, No. 892, § 1, provided: "The uncodified Section 7 of Act 551 of 1993 which sunsets the bifurcated sentencing procedures in Arkansas Code Annotated §§ 5-4-103, 16-97-101, 16-97-102, 16-97-103, and 16-97-104 is repealed."

CASE NOTES

Analysis

Applicability.
Construction.
Appeal.
Discovery.
Evidence.
Harmless error.
Sentencing by trial court.
Waiver of jury sentencing.

Applicability.

The bifurcated procedures outlined in this chapter are applicable to cases involving an alleged habitual offender. Daniels v. State, 322 Ark. 367, 908 S.W.2d 638 (1995).

Construction.

This section, which provides for sentencing by a jury after a plea of guilty under certain conditions, is not repugnant to ARCrP 36.1 [superseded], which provides in part that, except as provided by ARCrP 24.3(b), there shall be no appeal from a plea of guilty or nolo contendere; this section is to stand as compatible with the rule, recognizing that the legislature has provided not only for separate and distinct procedures governing jury trials

and sentencing by jury but for evidentiary matters as well. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

The permissive tone of the language in subdivision (4) of this section is unmistakable. Dale v. State, 55 Ark. App. 184, 935 S.W.2d 274 (1996).

The court was clearly authorized under subdivision (4) of this section, although not obligated, to consider the recommended alternative sentence recommended by the jury. Slaughter v. State, 69 Ark. App. 65, 12 S.W.3d 240 (2000).

Appeal.

Where defendant failed to object to the bifurcation of his trial on ex post facto grounds and failed to obtain a ruling on that specific issue, he waived that argument on appeal. Smith v. State, 318 Ark. 142, 883 S.W.2d 837 (1994).

Some exceptions to the rule in § 16-91-101(c), that there is no right to appeal from a guilty plea, include (1) ARCrP 24.3(b) permits an appeal from a conditional plea of guilty following the denial of a motion to suppress, (2) an appeal on the issue of the application of jail-time credit appears to be permissible, (3) the denial of a post-judgment motion, filed after a guilty plea to correct an illegal sentence, is appealable, and (4) and a defendant may also appeal after a guilty plea when a jury sets punishment under the bifurcated procedure established by subdivison (6) of this section. Hampton v. State, 48 Ark. App. 93, 890 S.W.2d 279 (1995).

Since the enactment of this section, the court has generally disallowed appeals in guilty plea cases, the one exception being that the court reviews nonjurisdictional issues such as the admission of testimony and evidence which arose during the penalty phase of the trial; this position does not indicate a willingness to review the imposition of a sentence simply where the defendant maintains his sentence is excessive when in fact his sentence is within the range prescribed by statute for the offense in question. Cupit v. State, 324 Ark. 438, 920 S.W.2d 852 (1996).

Discovery.

This section and § 16-97-102 do not prevent the rules of discovery from applying; therefore, trial court erred in holding the rules of discovery were inapplicable to the sentencing phase of a bifurcated trial. Phillips v. State, 321 Ark. 160, 900 S.W.2d 526 (1995).

Evidence.

The trial court did not abuse its discretion when it allowed the state to introduce evidence of the defendant's attempted escape in the sentencing part of his trial for robbery. Skiver v. State, 336 Ark. 86, 983 S.W.2d 931 (1999).

Harmless Error.

Failure to bifurcate trial for misdemeanor driving while intoxicated, first offense, held to be harmless error. Tauber v. State, 324 Ark. 47, 919 S.W.2d 196 (1996).

Sentencing by Trial Court.

Where the jury convicted defendant of possession of cocaine with intent to deliver and recommended a sentence of 3 years' probation, the trial court was permitted to sentence defendant to 20 years' imprisonment rather than follow the jury's recommendation; the jury's recommendation of 3 years' probation was not authorized by § 5-64-401(a)(1), which required a minimum sentence of 20 years. Ewings v. State, 85 Ark. App. 411, 155 S.W.3d 715 (2004).

Waiver of Jury Sentencing.

Defendant waived any issue about voir dire of the jury panel when he waived his right to have the jury decide punishment, asked the trial judge to set the sentence, and made no record of the reason for so doing. Armer v. State, 326 Ark. 7, 929 S.W.2d 705 (1996).

Sentencing, as in trial, allowed a defendant to waive a jury only with the agreement of the state; where the state declined to consent to defendant's request to waive a jury for his resentencing, the trial court did not err in submitting the matter to a jury. Buckley v. State, 349 Ark. 53, 76 S.W.3d 825 (2002), cert. denied, 537 U.S. 1058, 123 S. Ct. 633, 154 L. Ed. 2d 539 (2002).

Cited: Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996); Higgins v. State, 326 Ark. 1030, 936 S.W.2d 740 (1996); McClish v. State, 331 Ark. 295, 962 S.W.2d 332 (1998); Thomas v. State, 349 Ark. 447, 79 S.W.3d 347 (2002).

16-97-102. Sentencing by the court.

The following procedure shall govern sentencing by the court:

(1) When either party requests to present evidence relevant to sentencing, the court shall hear or receive such evidence and any rebuttal by the opposing party.

(2) If neither party requests a sentencing hearing, the court may order one or may order a presentence investigation pursuant to § 5-4-102.

(3) The court may hear or may request argument relevant to the appropriate sentence following either a hearing or a presentence investigation.

History. Acts 1993, No. 535, § 2; 1993, No. 551, § 2; 1997, No. 1262, § 23.

A.C.R.C. Notes. Acts 1995, No. 892, § 1, provided: "The uncodified Section 7 of Act 551 of 1993 which sunsets the bifurcated sentencing procedures in Arkansas Code Annotated §§ 5-4-103, 16-97-101, 16-97-102, 16-97-103, and 16-97-104 is repealed."

Cross References. Victim notification system, § 12-12-1201 et seq.

CASE NOTES

Analysis

In general.
Discovery.

In General.

The right to be present at sentencing is critical and vital to our criminal law system. Eberlein v. State, 315 Ark. 591, 869 S.W.2d 12 (1994).

Discovery.

This section and § 16-97-101 do not prevent the rules of discovery from applying; therefore, trial court erred in holding the rules of discovery were inapplicable to the sentencing phase of a bifurcated trial. Phillips v. State, 321 Ark. 160, 900 S.W.2d 526 (1995).

16-97-103. Evidence.

Evidence relevant to sentencing by either the court or a jury may include, but is not limited to, the following, provided no evidence shall be construed under this section as overriding the rape shield statute, § 16-42-101:

(1) The law applicable to parole, meritorious good time, or transfer;

(2) Prior convictions of the defendant, both felony and misdemeanor. The jury may be advised as to the nature of the previous convictions, the date and place thereof, the sentence received, and the date of release from confinement or supervision from all prior offenses;

(3) Prior judicial determinations of delinquency in juvenile court, subject to the following limitations:

(i) That prior delinquency adjudications be subject to a judicial determination that the relevant value of the prior juvenile adjudication outweigh its prejudicial value;

(ii) That consideration only be given to juvenile delinquency adjudications for crimes for which the juvenile could have been tried as an adult; and

(iii) That in no event shall delinquency adjudications for acts occurring more than ten (10) years prior to the commission of the offense charged be considered;

(4) Victim impact evidence or statements;

(5) Relevant character evidence;

(6) Evidence of aggravating and mitigating circumstances. The criteria for departure from the sentencing standards may serve as examples of this type of evidence;

(7) Evidence relevant to guilt presented in the first stage;

(8) Evidence held inadmissible in the first stage may be resubmitted for consideration in the second stage if the basis for exclusion did not apply to sentencing; and

(9) Rebuttal evidence.

History. Acts 1993, No. 535, § 2; 1993, No. 551, § 2.

A.C.R.C. Notes. Acts 1995, No. 892, § 1, provided: "The uncodified Section 7 of Act 551 of 1993 which sunsets the bifurcated sentencing procedures in Arkansas Code Annotated §§ 5-4-103, 16-97-101, 16-97-102, 16-97-103, and 16-97-104 is repealed."

CASE NOTES

Analysis

Constitutionality.
In general.
Construction.
Applicability.
Admissibility.
Aggravating circumstances.
Appeal.
Character evidence.
Discretion of court.
Evidence held irrelevant.
Fugitive status.
Hearsay.
Jury instructions.
"Nature of previous convictions".
Victim impact evidence.

Constitutionality.

Arkansas' bifurcated sentencing procedures in § 5-4-103 and this section are not violative of the ex post facto clause in the United States Constitution or Ark. Const., Art. 2, § 17. Diffee v. State, 319 Ark. 669, 894 S.W.2d 564 (1995).

The fact that a jury may take into consideration when a person convicted of a certain class of felony is eligible for parole or transfer is in no way a usurpation of the executive' department's power and authority to decide when an individual defendant should be released, and does not violate Ark. Const., Art. 4. Teague v. State, 328 Ark. 724, 946 S.W.2d 670 (1997).

In General.

Sentencing is now, in essence, a trial in and of itself, in which new evidence may be submitted. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Defendant's allegation that subdivision (1) conflicts with court rules was without merit where he failed to cite any express rule with which it conflicts. Travis v. State, 328 Ark. 442, 944 S.W.2d 96 (1997).

The evidence listed in the statute, including victim-impact evidence, is subject to the rules of evidence. Walls v. State, 336 Ark. 490, 986 S.W.2d 397 (1999).

Although defendant had been accused but not yet convicted of forgery, evidence that defendant was out on bond when he committed residential burglary and theft of property provided proof of his character and was relevant to the jury's determination of an appropriate punishment; the jury need not have learned of the details of defendant's bond requirements to understand that the fact that defendant was out on bond when he committed the new crimes said something about his character. Helms v. State, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 492 (June 22, 2005).

Construction.

This section simply allows the jury or court to exercise its discretion in considering all evidence relevant to sentencing and does not mandate automatic enhancement due to prior misdemeanor convictions. Davis v. State, 330 Ark. 76, 953 S.W.2d 559 (1997).

Applicability.

The trial court's retroactive employment of the 1994 versions of § 5-4-103 and this section to offenses committed in 1993 did not subject defendant to substantive prejudice in violation of the Ex Post Facto Clause of the United States Constitution. Williams v. State, 318 Ark. 846, 887 S.W.2d 530 (1994).

The admission of the defendant's prior juvenile adjudications did not violate the ex post facto principle, notwithstanding the contention that this section was improperly applied retroactively, since the admission of the prior adjudications did not change the nature or definition of the offense or increase the penalty to which he was subject. Snyder v. State, 332 Ark. 279, 965 S.W.2d 121 (1998).

Admissibility.

The introduction of evidence during this stage must be governed by the rules of admissibility and exclusion; otherwise, these proceedings would not pass constitutional muster, which is all the more reason to permit appeal. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Testimony regarding defendant's prior robbery attempt was properly admitted as an aggravating circumstance of the present robbery conviction under subdivision (6) of this section. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Evidence of uncharged misconduct held admissible as an aggravating factor during the sentencing phase. Davis v. State, 60 Ark. App. 179, 962 S.W.2d 815 (1998).

Evidence of defendant's prior deferred sentence in Oklahoma and plea of nolo contendere to the offense of rape in the first degree held admissible for sentencing purposes. McClish v. State, 331 Ark. 295, 962 S.W.2d 332 (1998).

Aggravating Circumstances.

In a prosecution for violation of a minor, the testimony of the victim's mother that defendant violated a no contact order, which provided that defendant was to have no contact with the victim, was evidence of an aggravating circumstance because it related to the offenses for which defendant was convicted; when he violated the no contact order, defendant continued to harm the victim, thus adding to the injurious consequences of his crime. Smith v. State, 354 Ark. 226, 118 S.W.3d 542 (2003).

Section 16-90-804 clearly indicates that the list of departure factors in that section is not exclusive; therefore, evidence of subsequent drug manufacturing was admissible in the sentencing phase of a drug trial because it was relevant for departure purposes. Crawford v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 292 (May 12, 2005).

Trial court did not err in admitting testimony during sentencing that defendant had raped another boy subsequent to his rape of the victim in the present case as the evidence was relevant to defendant's character and his propensity to continue to engage in similar activity in the future. Williams v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 593 (Oct. 6, 2005).

Appeal.

Review on appeal shall be confined to nonjurisdictional issues which arise during the penalty phase of the trial. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994).

Character Evidence.

Plain language of this section indicates that, while evidence introduced during the sentencing phase may include evidence described in this section, the list is not exhaustive; thus, evidence of subsequent drug manufacturing was admissible in the sentencing phase of the trial despite the fact that it was inadmissible in the guilt phase under Ark. R. Evid. 404. Crawford v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 292 (May 12, 2005).

Discretion of Court.

Permitting the state rebuttal argument in the sentencing phase when it has the burden of obtaining some penalty falls within the court's broad discretion. Caldwell v. State, 322 Ark. 543, 910 S.W.2d 667 (1995), cert. denied, 517 U.S. 1124, 116 S. Ct. 1361, 134 L. Ed. 2d 528 (1996).

Evidence Held Irrelevant.

The court properly refused to allow defendant at sentencing phase to testify as

to his experiences of prison life as such observations are irrelevant under this section. Clark v. State, 328 Ark. 501, 944 S.W.2d 533 (1997).

Fugitive Status.

Where a habitual offender with a prior child-molestation conviction in another state pleaded guilty to multiple child sexual-abuse charges in Arkansas, the trial court did not err in considering the fact that the defendant was a fugitive from an indictment for sexual solicitation of a child in that other state; the trial judge specifically stated that he would not be considering the indictment for purposes of a conviction or as evidence of guilt, and the defendant failed to meet his burden to overcome the presumption that the trial court only considered competent evidence. Marshall v. State, 342 Ark. 172, 27 S.W.3d 392 (2000).

Hearsay.

In a prosecution on two counts of delivery of a controlled substance, the trial court committed reversible error when it allowed a police officer to present hearsay testimony during the sentencing phase of the trial regarding prior drug activity of the defendant for which he was never charged, tried, or convicted; prejudice was shown by the fact that the jury sentenced the defendant to two life sentences. Buckley v. State, 341 Ark. 864, 20 S.W.3d 331 (2000).

Jury Instructions.

It is not error for a trial court to inform the jury of the Governor's power to pardon. Stephens v. State, 328 Ark. 81, 941 S.W.2d 411 (1997).

As this section controls over the ruling in Andrews v. State, the court did not err in permitting a jury instruction relating to parole and transfer. Spann v. State, 328 Ark. 509, 944 S.W.2d 537 (1997).

"Nature of Previous Convictions".

The plain meaning of the term "nature of the previous convictions" refers to the general character of the pertinent crime. Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996).

Victim Impact Evidence.

Videotape of victim's family and friends and its concomitant narration held admissible where the trial judge viewed the videotape before allowing it to be played to the jury, ruled portions of the tape inadmissible, ordered the narrator to describe the pictures, but not embellish them, and otherwise gave expressed and careful consideration of the videotape's relevancy and purpose. Hicks v. State, 327 Ark. 727, 940 S.W.2d 855 (1997).

The trial court did not abuse its discretion in excluding, in the sentencing phase, victim-impact evidence of the victim's arrests that were abated by his death where the defendant was allowed to introduce the victim's prior felony convictions. Brooks v. State, 328 Ark. 32, 941 S.W.2d 409 (1997).

In the prosecution of a boy scout leader for the rapes of several boys under his care, testimony regarding the defendant's involvement in the murder of one of the boy's parents was not proper victim impact evidence. Walls v. State, 336 Ark. 490, 986 S.W.2d 397 (1999).

Victim impact evidence is not applicable in juvenile proceedings as juveniles are not "convicted" and "sentenced" and, instead, are "adjudicated" and have their cases go to "disposition." Hunter v. State, 341 Ark. 665, 19 S.W.3d 607 (2000).

Cited: Pryor v. Norris, 103 F.3d 710 (8th Cir. 1997); Vanesch v. State, 70 Ark. App. 277, 16 S.W.3d 306 (2000); Ridling v. State, 348 Ark. 213, 72 S.W.3d 466 (2002).

16-97-104. Proof of prior convictions.

Proof of prior convictions, both felony and misdemeanor, and proof of juvenile adjudications shall follow the procedures outlined in §§ 5-4-502 — 5-4-504.

History. Acts 1993, No. 535, § 2; 1993, No. 551, § 2.

A.C.R.C. Notes. Acts 1995, No. 892, § 1, provided: "The uncodified Section 7 of Act 551 of 1993 which sunsets the bifurcated sentencing procedures in Arkansas Code Annotated §§ 5-4-103, 16-97-101, 16-97-102, 16-97-103, and 16-97-104 is repealed."

CASE NOTES

In General.

After a determination of guilt by the jury, the trial court hears proof of a charged habitual offender's prior convictions outside of the presence of the jury; the court then instructs the jury on the number of such offenses and the statutory range. Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996).

CHAPTER 98

TREATMENT FOR DRUG ABUSE

SUBCHAPTER.

1. General Provisions. [Reserved.]
2. Pretrial or Posttrial Treatment, Intervention, and Diversion Programs.
3. Arkansas Drug Court Act.

Subchapter 1 — General Provisions

[Reserved]

Subchapter 2 — Pretrial or Posttrial Treatment, Intervention, and Diversion Programs

SECTION.

16-98-201. Qualifications — Waiver.

16-98-201. Qualifications — Waiver.

Any judicial district, with the agreement of the parties, may establish a program whereby a defendant may be transferred to a pretrial or posttrial treatment program for drug abuse, provided that:

(1) The treatment program is at least one (1) year in length and meets the minimum standards of treatment promulgated by the Bureau of Alcohol and Drug Abuse Prevention of the Department of Health and Human Services;

(2) The charge or charges against the defendant carries a punishment which may be suspended;

(3) The defendant waives his or her rights to a speedy trial and such other rights as are agreed to by the parties and executes a consent for a limited release of confidential information regarding treatment permitting the judge, the prosecutor, and the defense attorney access to information relating to attendance, attitude, participation, and results of drug screens; and

(4)(A) The defendant is eighteen (18) years of age or older.

(B) This provision may be waived with the consent of the prosecuting attorney.

History. Acts 1994 (2nd Ex. Sess.), No. 53, § 1.

Subchapter 3 — Arkansas Drug Court Act

SECTION.
16-98-301. Short title.
16-98-302. Definitions.
16-98-303. Drug court programs authorized.
16-98-304. Cost and fees.

Effective Dates. Acts 2003, No 1266, § 5: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that there is serious overcrowding in Department of Correction facilities; that the overcrowding is likely to worsen if alternative sentencing measures are not enacted; and that this act is immediately necessary because it is designed to establish a procedure to help alleviate the overcrowding by offering sentencing alternates to person charged with certain drug offenses and should be given immediate effect. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003."

16-98-301. Short title.

This subchapter shall be known as the "Arkansas Drug Court Act".

History. Acts 2003, No. 1266, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Drug Intervention Program, 26 UALR L.J. 448.

16-98-302. Definitions.

For purposes of this subchapter:

(1) "Drug court program" means a highly structured judicial intervention process for substance abuse treatment of eligible offenders which requires successful completion of the drug court program treatment in lieu of incarceration; and

(2) "Drug court team" means a circuit judge, a prosecuting attorney, a defense attorney, and one (1) or more addiction counselors.

History. Acts 2003, No. 1266, § 2.

16-98-303. Drug court programs authorized.

(a) Each judicial district of this state is authorized to establish a drug court program under this subchapter, which may be preadjudication or postadjudication subject to the availability of funds.

(b)(1) A drug court program shall not be available to any defendant having a pending violent criminal charge against him or her.

(2) Eligible offenses may be further restricted by the rules of a specific drug court program.

(3) Nothing in this subchapter shall require a drug court to consider or accept every offender with a treatable condition or addiction, regardless of the fact that the controlling offense is eligible for consideration in the program.

(4) Any offender who is determined not appropriate for the drug court program shall be prosecuted as provided by law.

(c)(1) Drug court programs may require a separate judicial processing system differing in practice and design from the traditional adversarial criminal prosecution and trial systems.

(2) A drug court team shall be designated consisting of a circuit judge to administer the program, a prosecuting attorney, a defense attorney, and one (1) or more addiction counselors who has appropriate understanding of the goals of the program and of the appropriate treatment methods for the various conditions and any other individual or individuals determined necessary by the drug court judge.

(3) The administrative judge of the judicial district or an agreement of a majority of the circuit judges in the judicial district shall designate one (1) or more judges to administer the drug court program.

(d) All drug court programs shall be required to keep reliable data on:

(1) Recidivism;

(2) Relapses;

(3) Restarts;

(4) Sanctions imposed; and

(5) Incentives given.

(e) Each judicial district may develop a training and implementation manual for drug court programs with the assistance of the:

(1) Department of Health and Human Services;

(2) Department of Education;

(3) Department of Workforce Education;

(4) Department of Correction;

(5) Department of Community Correction; and

(6) Administrative Office of the Courts.

History. Acts 2003, No. 1266, § 3.

16-98-304. Cost and fees.

(a) The drug court judge may order the offender to pay:

(1) Court costs;

(2) Treatment costs;

(3) Drug testing costs;

(4) A program user fee not to exceed twenty dollars ($20.00) per month; and

(5) Necessary supervision fees, including any applicable residential treatment fees.

(b)(1) The drug court judge shall establish a schedule for the payment of costs and fees.

(2) The cost for treatment, drug testing, and supervision shall be set by the treatment and supervision providers respectively and made part of the order of the drug court judge for payment.

(3) User fees shall be set by the drug court judge within the maximum amount authorized by this subsection and payable directly to the court clerk for the benefit and administration of the drug court program.

(4) Treatment, drug testing, and supervision costs shall be paid to the respective providers.

(5) The court clerk or the designee of the drug court judge shall collect all other costs and fees ordered.

(6)(A) The remaining user fees shall be remitted to the Treasurer of State by the court clerk for deposit in the MAGNUM Drug Court Fund, which is a special revenue fund created and established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State.

(B) The MAGNUM Drug Court Fund shall consist of user fees and any other moneys provided by law.

(7) Court orders for costs and fees shall remain an obligation of the offender with court monitoring until fully paid.

History. Acts 2003, No. 1266, § 4.

A.C.R.C. Notes. Acts 2003, No. 1266, § 4, is also codified as § 19-6-490.

CHAPTERS 99-104

[Reserved]

SUBTITLE 7. PARTICULAR PROCEEDINGS AND REMEDIES

CHAPTER 105

ABATEMENT OF NUISANCES

SUBCHAPTER.

1. General Provisions.
2. Roadhouses, Tourist Camps, Etc.
3. Dance Halls.
4. Drugs.
5. Noise Pollution.

Cross References. Place for illegal sale of narcotic drugs deemed common nuisance, § 20-64-213.

RESEARCH REFERENCES

Am. Jur. 58 Am. Jur. 2d, Nuis., § 1 et seq.

C.J.S. 66 C.J.S, Nuis., § 1 et seq.

Subchapter 1 — General Provisions

[Reserved]

Subchapter 2 — Roadhouses, Tourist Camps, Etc.

SECTION.

16-105-201. Definition.
16-105-202. Subchapter cumulative.
16-105-203. Penalties.
16-105-204. Public nuisance created by certain unlawful acts and materials.
16-105-205. Jurisdiction — Parties who may bring action.
16-105-206. Petition for abatement.
16-105-207. Hearings for temporary and permanent injunction — Bond — Notice.
16-105-208. Hearings for temporary and permanent injunction — Procedures.
16-105-209. Order of abatement.
16-105-210. Proceedings against two or more owners.
16-105-211. Fees of prosecuting attorney.

Effective Dates. Acts 1915, No. 109, § 11: approved Mar. 6, 1915. Emergency declared.

Acts 1937, No. 331, § 3: Mar. 25, 1937. Emergency clause provided: "It is found that a great number of the so called roadhouses, tourist camps, public dance halls, places where alcoholic liquors are sold, and other similar places of entertainment in this State are so operated and conducted as to result in constant violations of the various laws of this State and that consequently it is necessary for the preservation of the public peace, health and safety that this act become effective immediately upon its adoption and approval; therefore, an emergency is hereby declared to exist, and this act shall become effective immediately upon its adoption and approval."

Acts 1957, No. 188, § 3: Mar. 8, 1957. Emergency clause provided: "It is hereby found and determined that the practice of nudism in this State is against public policy and is a violation of the laws of the State, that any club, camp, building or place used to practice nudism is injurious to the public morals, and that the immediate passage of this Act is necessary in order to prevent the use of any club, camp, building or place from being used to practice nudism in this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Equity — Enjoinability of Threatened Nuisance, 6 Ark. L. Rev. 231.

16-105-201. Definition.

As used in this subchapter, unless the context otherwise requires, "owner" shall mean any person, persons, or corporation having an actual legal interest, vested in possession, in any building or place that may become a nuisance under the provisions of this subchapter.

History. Acts 1915, No. 109, § 8; C. & M. Dig., § 6203; Pope's Dig., § 10925; A.S.A. 1947, § 34-108.

CASE NOTES

Nickelodeons.

Owners of nickelodeon operated for the mutual profit of themselves and the owner of the dance hall where located were "owners" within this section defining owners of property deemed a public nuisance, and the machine was subject to the order of the court abating the dance hall as a public nuisance. Hood v. State, 206 Ark. 900, 175 S.W.2d 205 (1944).

16-105-202. Subchapter cumulative.

This subchapter shall not repeal any law or laws prohibiting or regulating the sale of intoxicating liquors now in force, but shall be cumulative to all laws now in force.

History. Acts 1915, No. 109, § 9; C. & M. Dig., § 6205; Pope's Dig., § 10927; A.S.A. 1947, § 34-110.

CASE NOTES

Cited: Fraternal Order of Eagles v. State, 246 Ark. 568, 439 S.W.2d 36 (1969).

16-105-203. Penalties.

(a) If any person shall break into or enter or use any building or place while closed under a preliminary injunction granted under the provisions of this subchapter or shall violate any permanent injunction under the provisions of this subchapter, he or she shall be subject to punishment for contempt.

(b) Upon conviction for the contempt, the person shall be guilty of a Class B misdemeanor. The building or place shall be closed and not thereafter used for any purpose whatever for a period of twelve (12) months, except by order of the court having cognizance of the case.

History. Acts 1915, No. 109, § 7; C. & M. Dig., § 6202; Pope's Dig., § 10924; A.S.A. 1947, § 34-107; Acts 2005, No. 1994, § 397.

Amendments. The 2005 amendment inserted "or she" in (a); and, in (b), substituted "guilty of a Class B misdemeanor" for "imprisoned in the county jail not less than thirty (30) days nor more than six (6) months and may also be fined in any sum not exceeding fifty dollars ($50.00)."

CASE NOTES

Analysis

In general.
Closure of establishments.
Evidence.
Information.

In General.

The circuit court has the power to abate a nuisance by injunction and thus has power to punish a party for contempt for disobedience of its order. Adams v. State, 153 Ark. 202, 240 S.W. 5 (1922).

Closure of Establishments.

In directing that buildings be closed and not used for any purpose for a period of 12 months, the trial court exceeded its statutory powers where, at the time the order was made, there had been no contempt proceeding. Futrell v. State, 207 Ark. 452, 181 S.W.2d 680 (1944).

Evidence.

The test is whether the preponderance of the evidence in contempt proceedings supports the finding of the trial court since the rules of chancery procedure are applicable. Vandergriff v. State, 239 Ark. 1119, 396 S.W.2d 818 (1965).

Information.

Official oath of prosecuting attorney is a sufficient verification of an information for contempt when filed by him. Nichols v. State, 171 Ark. 987, 287 S.W. 190 (1926).

16-105-204. Public nuisance created by certain unlawful acts and materials.

(a) The conducting, maintaining, carrying on, or engaging in the sale of alcoholic liquors, including wines and beer of all kinds, in violation of any of the laws of this state, in any building, structure, or place within this state, and the conducting, maintaining, carrying on, or engaging in the operation of any so-called roadhouses or other similar places of entertainment, of any so-called tourist camp, of any public dance hall or place, or of any nudist camp or club or building or place used to practice nudism, in violation of any of the laws of this state, and all means, appliances, fixtures, appurtenances, materials, and supplies used for the purpose of conducting, maintaining, or carrying on of either of such unlawful or unlawfully operated businesses or occupations or practices or places of business or occupation or practice, are declared to be public nuisances and may be abated under the provisions of this subchapter.

(b) Any person, persons, association, partnership, firm, or corporation conducting, maintaining, carrying on, or engaging in any of the businesses or occupations or practices or undertakings pursuant to subsection (a) of this section who shall suffer or permit violations of any of the laws of this state in, upon, or about the premises operated or maintained by him, them, or it shall be deemed and held to be conducting, maintaining, carrying on, and engaging in the business, occupation, practice, or undertaking in violation of the laws of this state.

History. Acts 1915, No. 109, § 1; C. & M. Dig., § 6196; Acts 1937, No. 331, § 1; Pope's Dig., § 10918; Acts 1957, No. 188, § 1; A.S.A. 1947, § 34-101.

CASE NOTES

Analysis

Constitutionality.
In general.
Applicability.
Alcoholic beverages.
Evidence.
Nudism.
Roadhouses, etc.
Use of property.

Constitutionality.

This section is valid. Marvel v. State ex rel. Morrow, 127 Ark. 595, 193 S.W. 259 (1917); Adams v. State, 153 Ark. 202, 240 S.W. 5 (1922).

In General.

A place of public business where the proprietor and agents are engaged in certain affirmative actions violative of the law or permit or suffer violations of any law of this state on or about the premises may be declared a public nuisance. Alston v. State, 216 Ark. 604, 226 S.W.2d 988 (1950).

Applicability.

This section has no applicability to "snooker parlors" or pool halls and billiard rooms, but only to the sale of intoxicating liquors in violation of law. Rogers v. State ex rel. Robinson, 194 Ark. 633, 109 S.W.2d 120 (1937).

Alcoholic Beverages.

One having a place in Arkansas from which he solicited orders for a liquor house in Missouri was maintaining a public nuisance. Hickey v. State, 123 Ark. 180, 184 S.W. 459 (1916).

Unlawful sale in defendant's home may be restrained. Nichols v. State, 171 Ark. 987, 287 S.W. 190 (1926).

This section, as it stood before amendment, was not repealed by Liquor Control Act, and it still conferred jurisdiction upon the courts to abate as a public nuisance the business of one engaged in selling beer to minors. Digiacomo v. State, 194 Ark. 24, 105 S.W.2d 78 (1937).

State was not precluded from proceeding to abate defendant's liquor store as a public nuisance because other methods outlined under the Alcoholic Control Act might have been followed. Click v. State, 206 Ark. 648, 176 S.W.2d 920 (1944).

The sale of alcoholic beverages at a private club is a "public nuisance" and thus abatable. Fraternal Order of Eagles v. State, 246 Ark. 568, 439 S.W.2d 36 (1969).

Allowing minors to possess intoxicating liquors and allowing patrons to consume intoxicating beverages on unlicensed public premises were each violations of this section. Rendezvous Club v. State, 247 Ark. 670, 447 S.W.2d 842 (1969).

Evidence.

The fact that minors drank beer in cafe purchased outside, in the absence of proof that any person engaged with operating the cafe knew or could have known of the activity, was insufficient evidence to constitute a public nuisance so as to warrant closing the cafe as a public nuisance. Alston v. State, 216 Ark. 604, 226 S.W.2d 988 (1950).

Since the state offered ample proof to support the trial court's finding as to the acts of nuisance, whatever error the court might have made as to the burden of proof was harmless. Siesta Cafe v. State, 231 Ark. 1004, 333 S.W.2d 722 (1960).

Nudism.

Where theater owner merely exhibited films depicting nude persons, theatre was not a "nudist camp or club or building or place used to practice nudism" within meaning of abatement of nuisance statute and showing of films could not be enjoined under statutes defining nudism and prohibiting advocacy thereof. Mini-Art Operating Co. v. State, 253 Ark. 364, 486 S.W.2d 8 (1972).

A motion picture theater showing obscene films is not a nuisance under this section. Southland Theaters, Inc. v. State ex rel. Tucker, 254 Ark. 639, 495 S.W.2d 148 (1973).

Roadhouses, etc.

When strictly construed, the statutory reference to roadhouses and similar places of entertainment could not have been interpreted to include motion picture theaters. Southland Theaters, Inc. v. State ex rel. Tucker, 254 Ark. 192, 492 S.W.2d 421 (1973).

Use of Property.

Purchaser of equipment which had formerly been used by vendor in a place

restrained from operation for violation of this section may not be deprived of the use and enjoyment of the property he has purchased unless he so conducts his place of business as to make it become a nuisance under this section. Rogers v. State ex rel. Robinson, 194 Ark. 633, 109 S.W.2d 120 (1937).

Cited: Marvel v. State ex rel. Morrow, 127 Ark. 595, 193 S.W. 259 (1917); Adams v. State, 153 Ark. 202, 240 S.W. 5 (1922); Citizens Coach Co. v. Wright, 228 Ark. 1143, 313 S.W.2d 94 (1958).

16-105-205. Jurisdiction — Parties who may bring action.

Jurisdiction is conferred upon the circuit courts of this state to abate the public nuisances defined in § 16-105-204, upon petition in the name of the state, upon relation of the Attorney General or any prosecuting attorney of the state, or without the concurrence of the officers, upon the relation of five (5) or more citizens and freeholders of the county wherein the nuisances may exist, in the manner provided in this subchapter.

History. Acts 1915, No. 109, § 2; C. & M. Dig., § 6197; Pope's Dig., § 10919; A.S.A. 1947, § 34-102; Acts 2003, No. 1185, § 221.

Amendments. The 2003 amendment deleted "chancery and" preceding "circuit courts."

CASE NOTES

Analysis

In general.
Chancery courts.
Rules of procedure.

In General.

This section confers jurisdiction of civil actions to declare a place of business a public nuisance upon the chancery and circuit courts. Siesta Cafe v. State, 231 Ark. 1004, 333 S.W.2d 722 (1960).

Chancery Courts.

This section is valid in that it does not prescribe additional jurisdiction for the chancery court but merely prescribes a new condition upon which the existing jurisdiction of the court may be exercised. Marvel v. State ex rel. Morrow, 127 Ark. 595, 193 S.W. 259 (1917).

Rules of Procedure.

By virtue of § 16-105-208, chancery rules are applied in an action to abate a public nuisance regardless of whether the action is in the circuit or chancery court. State ex rel. Att'y Gen. v. Williams, 222 Ark. 966, 264 S.W.2d 417 (1954).

Cited: Adams v. State, 153 Ark. 202, 240 S.W. 5 (1922); Click v. State, 206 Ark. 648, 176 S.W.2d 920 (1944); Alston v. State, 216 Ark. 604, 226 S.W.2d 988 (1950); Vandergriff v. State, 239 Ark. 1119, 396 S.W.2d 818 (1965).

16-105-206. Petition for abatement.

(a) Whenever a public nuisance, as defined in this subchapter, is kept, maintained, carried on, or exists in any county in this state, a bill or petition may be filed in any circuit court of the county, in the name of the state, by and upon the relation of any persons named in § 16-105-205, against the person or persons keeping, maintaining, or carrying on the nuisance, and all aiders and abettors therein, and the owners, proprietors, or agents or persons or corporations, in charge or control of the building or place wherein the nuisance exists, for the purpose of having the nuisance abated and permanently discontinued.

(b)(1) However, when a bill or petition is filed by citizens and freeholders, they shall make bond in such sums as the court shall prescribe, conditioned to pay all costs and damages, in the event the court trying the case shall find and adjudge that the proceeding was instituted without probable cause.

(2) No bond for costs or damages shall be required when the proceeding is instituted by and upon the relation of the Attorney General or a prosecuting attorney for the state.

History. Acts 1915, No. 109, § 3; C. & M. Dig., § 6198; Pope's Dig., § 10920; A.S.A. 1947, § 34-103; Acts 2003, No. 1185, § 221.

Amendments. The 2003 amendment, in (a), deleted "chancery or" preceding "circuit court"; and substituted the first occurrence of "court" for "judges or chancellors" in (b)(1).

CASE NOTES

Sufficiency of Petition.

Petition on ground of sale of beer to minors did not need to designate the particular kind of liquor sold, it being immaterial what kind of liquors were sold if they were in fact intoxicating. Digiacomo v. State, 194 Ark. 24, 105 S.W.2d 78 (1937).

16-105-207. Hearings for temporary and permanent injunction — Bond — Notice.

(a)(1) In the proceedings the court, upon the presentation of a bill therefor alleging that the nuisance complained of exists, shall award a temporary injunction, with such bond as required by law in cases where the bill is filed by citizens and freeholders.

(2) However, no bond shall be required when the bill or petition is filed by the officers mentioned in this subchapter if it shall be made to appear to the satisfaction of the court, by evidence in the form of a due and proper verification of the bill or petition under oath, or of affidavits, depositions, oral testimony, or otherwise, as the complainants or petitioners may elect, that the allegations of the bill or petition are true, enjoining and restraining the further continuance of the nuisance, and the closing of the building or place wherein the nuisance is conducted until the further order of the court.

(b)(1) Five (5) days' notice in writing shall be given the defendant of the hearing of an application for a permanent injunction, but no notice shall be required of the hearing of a temporary injunction. If a hearing is continued at the instance of defendant, the writ as prayed for shall be granted as a matter of course.

(2) When the injunction has been granted, it shall be binding upon the defendant throughout the county until modified or set aside by the court having cognizance of the case.

(3) Any violation thereof, by the defendant or upon his or her procurement, shall be a contempt of court and punished as provided in § 16-105-203.

History. Acts 1915, No. 109, § 4; C. & M. Dig., § 6199; Pope's Dig., § 10921; A.S.A. 1947, § 34-104; Acts 2003, No. 1185, § 221.

Amendments. The 2003 amendment deleted "judge, or chancellor" following "the court" throughout.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law: Constitutional Law, 4 UALR L.J. 179.

CASE NOTES

Analysis

Notice.
Time limit.

Notice.

The granting of a temporary injunction without notice addresses itself to judicial discretion in granting or withholding the relief; thus, the requirement of due process is satisfied in a case of such brief restraint. Vandergriff v. State, 239 Ark. 1119, 396 S.W.2d 818 (1965).

An objection for lack of proper notice cannot be raised after a hearing on the merits in which the injunction is made permanent. Vandergriff v. State, 239 Ark. 1119, 396 S.W.2d 818 (1965).

Time Limit.

The court has no power to order the closing of a building for any length of time except during the period from the granting of the temporary order until the final hearing of the petition for abatement and except by way of additional punishment for violation of the court's order enjoining the nuisance. Futrell v. State, 207 Ark. 452, 181 S.W.2d 680 (1944).

Cited: Fraternal Order of Eagles v. State, 246 Ark. 568, 439 S.W.2d 36 (1969).

16-105-208. Hearings for temporary and permanent injunction — Procedures.

(a) Upon the trial of all causes pursuant to this subchapter, evidence of the general reputation of the building or place where the nuisance is alleged to exist shall be admissible for the purpose of proving or tending to prove the existence of the nuisance.

(b)(1) The fact that the defendant has paid the internal revenue special tax as a retail liquor dealer or is in possession of an internal revenue tax stamp as a retail liquor dealer shall be prima facie evidence of sales of intoxicating liquors by the defendant during the time for which he or she has paid the internal revenue special tax.

(2) Copies of the records of the office of the Internal Revenue Service showing that the defendant has paid the internal revenue special tax shall be admissible in evidence in the proceeding when the copies are certified to be full, true, and complete by the district internal revenue collector.

History. Acts 1915, No. 109, § 5; C. & M. Dig., § 6200; Pope's Dig., § 10922; A.S.A. 1947, § 34-105; Acts 2003, No. 1185, § 221.

Amendments. The 2003 amendment deleted former (a); and redesignated former (b) and (c) as present (a) and (b).

Cross References. Alcoholic beverages generally, § 3-4-101 et seq.

Alcoholic beverages, excise taxes, § 3-7-101 et seq.

Applicability of the Arkansas Rules of Civil Procedure, ARCP 81.

CASE NOTES

Analysis

Constitutionality.
In general.
Applicability.
Appeals.
Evidence.

Constitutionality.

Permitting introduction of evidence of general reputation of the building or place where nuisance is alleged to exist, for the purpose of proving its existence is not unconstitutional. Foley v. State, 200 Ark. 521, 139 S.W.2d 673 (1940).

In General.

By virtue of this section, chancery rules are applied in an action to abate a public nuisance regardless of whether the action is in the circuit or chancery court. State ex rel. Att'y Gen. v. Williams, 222 Ark. 966, 264 S.W.2d 417 (1954).

Applicability.

Proof must show unlawful business is being conducted before this section applies. State v. One Ford Auto., 151 Ark. 29, 235 S.W. 378 (1921).

Appeals.

If preponderance of testimony supported circuit court's finding that defendant's liquor store was a public nuisance, the Arkansas Supreme Court was required to affirm the order abating it. Click v. State, 206 Ark. 648, 176 S.W.2d 920 (1944).

Since the state offered ample proof to support the trial court's finding as to the acts of nuisance, whatever error the court might have made as to the burden of proof was harmless. Siesta Cafe v. State, 231 Ark. 1004, 333 S.W.2d 722 (1960).

Evidence.

Proof that defendant has himself sold beer to minors or had directed it to be done is not essential. Digiacomo v. State, 194 Ark. 24, 105 S.W.2d 78 (1937).

In action to abate operation of restaurant as a public nuisance, evidence was sufficient to justify finding that beer and wine were sold, dancing permitted, and gambling carried on in the establishment. Portman v. State ex rel. Wood, 204 Ark. 349, 162 S.W.2d 67 (1942).

Evidence of unlawful sales and drinking of intoxicating liquor and of numerous quarrels, affrays, and breaches of the peace within, around, and about the liquor store was sufficient to sustain order closing store as a public nuisance. Click v. State, 206 Ark. 648, 176 S.W.2d 920 (1944).

Cited: Alston v. State, 216 Ark. 604, 226 S.W.2d 988 (1950); Vandergriff v. State, 239 Ark. 1119, 396 S.W.2d 818 (1965).

16-105-209. Order of abatement.

(a) If, upon the trial of a cause pursuant to this subchapter, the existence of the nuisance is established, an order of abatement shall be entered as part of the judgment or decree of the court.

(b)(1) The order shall direct the removal from the building or place wherein the nuisance exists or is maintained of all means, appliances, fixtures, appurtenances, materials, supplies, and instrumentalities used for the purpose of conducting, maintaining, or carrying on the unlawful business or occupation constituting the nuisance and shall direct the sale thereof, or such portion thereof as may be lawfully sold, upon terms as the court may order, and the payment of the proceeds into court to be applied to costs or paid over to the owner, and destruction of the portion thereof, if any, as cannot be lawfully sold within this state.

(2) The judgment or decree shall perpetually enjoin the defendants from engaging in, conducting, continuing, or maintaining the nuisance, directly or indirectly, by themselves or their agents or representatives,

and perpetually forbid the owner of the building from permitting or suffering the same to be done or carried on in the building or place.

History. Acts 1915, No. 109, § 6; C. & M. Dig., § 6201; Pope's Dig., § 10923; A.S.A. 1947, § 34-106.

CASE NOTES

Disobedience of Order.

The circuit court has the power to abate a nuisance by injunction and thus has power to punish a party for contempt for disobedience of its order. Adams v. State, 153 Ark. 202, 240 S.W. 5 (1922).

Cited: Fraternal Order of Eagles v. State, 246 Ark. 568, 439 S.W.2d 36 (1969).

16-105-210. Proceedings against two or more owners.

(a) When one (1) of two (2) or more joint owners has been served with the notice prescribed in this subchapter, the cause shall proceed against the owner on whom notice has been served, and the proceeding shall not be a bar to subsequent proceedings against one (1) or all of the joint owners not heretofore proceeded against.

(b) If the notice prescribed in this subchapter cannot be served on the owner or owners of the building or place that may become a nuisance under the provisions of this subchapter, by reason of nonresidence or otherwise, then and in that case, notice may be served on any agent or agents or trustee that may have charge of, or be in control of, the building or place and the cause shall proceed against the agent, agents, or trustee in all respects as if he or she or they were the actual owner or owners of the building or place.

History. Acts 1915, No. 109, § 8; C. & M. Dig., § 6203; Pope's Dig., § 10925; A.S.A. 1947, § 34-108.

16-105-211. Fees of prosecuting attorney.

In all cases wherein the bill or petition is filed upon the relation of a prosecuting attorney of this state and a permanent injunction is granted therein, the officer shall receive such fees as are now provided by law for convictions for the illegal sale of intoxicating liquors. The fees shall be paid by defendant as part of the costs of the case.

History. Acts 1915, No. 109, § 10; C. & M. Dig., § 6204; Pope's Dig., § 10926; A.S.A. 1947, § 34-109.

CASE NOTES

Appeals.

Where an injunction was obtained preventing the defendant from conducting a nuisance, no provision was made for the assessment of an affirmance fee on appeal. Hickey v. State, 124 Ark. 18, 186 S.W. 291 (1916).

Subchapter 3 — Dance Halls

SECTION.
16-105-301. Definitions.
16-105-302. Penalties.
16-105-303. Public nuisance.
16-105-304. Jurisdiction — Persons who may bring abatement proceedings.
16-105-305. Petition for abatement.
16-105-306. Hearings for temporary and permanent injunction — Bond — Notice.
16-105-307. Hearings for temporary and permanent injunction — Evidence.
16-105-308. Order of abatement.
16-105-309. Proceedings against two or more owners.

Effective Dates. Acts 1937, No. 118, § 10: approved Feb. 24, 1937. Emergency clause provided: "This act being necessary for the preservation of the public peace, health, and safety and public morals, an emergency is deemed to exist, and the same shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law: Constitutional Law, 4 UALR L.J. 179.

CASE NOTES

Constitutionality.

This subchapter is not unconstitutional because jurisdiction is conferred on the circuit court and the chancery court to enforce it. Foley v. State, 200 Ark. 521, 139 S.W.2d 673 (1940).

This subchapter, authorizing a temporary or permanent injunction against operation of a dance hall without notice and an opportunity to be heard, fails to meet the fundamental requirements of the due process clause of the U.S. Const., Amends. 5 and 14 and Ark. Const., Art. 2, § 21. Franklin v. State, 267 Ark. 311, 590 S.W.2d 28 (1979).

16-105-301. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Dance hall" means any building, premise, pavilion, or place of business wherein dancing is permitted, conducted, or engaged in, by the public in general, either for profit or not;

(2) "Owner" means any person, persons, or corporation having an actual legal interest, vested in possession, in any building or place that may become a nuisance under the provisions of this subchapter.

History. Acts 1937, No. 118, §§ 1, 9; Pope's Dig., §§ 10909, 10917; A.S.A. 1947, §§ 34-111, 34-119.

CASE NOTES

Analysis

Dance halls.
Owners.

Dance Halls.

Where cafe operator kept a music machine and permitted couples to dance, the cafe fell within the statutory definition of a dance hall. Lawson v. State, 226 Ark. 170, 288 S.W.2d 585 (1956).

Owners.

Owners of a nickelodeon operated for the mutual profit of themselves and the owner of the dance hall where the nickelodeon was located were "owners" within this section defining owners of property deemed a public nuisance; thus, the machine was subject to the order of the court abating the dance hall as a public nuisance. Hood v. State, 206 Ark. 900, 175 S.W.2d 205 (1944).

16-105-302. Penalties.

(a) If any person shall break into or enter or use any building or place while closed under a preliminary injunction granted under the provisions of this subchapter or shall violate any permanent injunction under the provisions of this subchapter, he or she shall be subject to punishment for contempt.

(b) Upon conviction of the contempt, the person shall be imprisoned in the county jail not less than thirty (30) days nor more than six (6) months and may also be fined in any sum not exceeding fifty dollars ($50.00). The building or place shall be closed and not used thereafter for any purpose whatever for a period of twelve (12) months, except by order of the court having cognizance of the case.

History. Acts 1937, No. 118, § 8; Pope's Dig., § 10916; A.S.A. 1947, § 34-118.

CASE NOTES

Closure of Establishments.

Court, in directing that buildings be closed and not used for any purpose for a period of 12 months, exceeded its statutory powers where, at the time the order was made, there had been no contempt proceeding. Futrell v. State, 207 Ark. 452, 181 S.W.2d 680 (1944).

The more severe course of closing the establishment for a year is authorized only in contempt proceedings for a violation of the final injunctive order. Lawson v. State, 226 Ark. 170, 288 S.W.2d 585 (1956); Siesta Cafe v. State, 231 Ark. 1004, 333 S.W.2d 722 (1960).

16-105-303. Public nuisance.

The operation of a dance hall in which, or around which, public disturbances, the unlawful drinking of intoxicating liquors, quarrels, affrays, or general breaches of the peace are frequent is declared to be a public nuisance and detrimental to the public morals and may be abated under the provisions of this subchapter as set out.

History. Acts 1937, No. 118, § 2; Pope's Dig., § 10910; A.S.A. 1947, § 34-112.

16-105-304. Jurisdiction — Persons who may bring abatement proceedings.

(a) Jurisdiction is conferred upon the circuit courts of this state to abate the public nuisance defined in § 16-105-303, upon petition in the name of the State of Arkansas on relation of the Attorney General or any prosecuting attorney of the state or without the concurrence of the officers upon the relation of ten (10) or more qualified electors and freeholders of the county living within a radius of two (2) miles wherein the nuisance may exist, in the manner set forth in this subchapter.

(b) On petition, addressed to the prosecuting attorney, of ten (10) qualified electors and freeholders of the county wherein the nuisance may exist, it shall become the mandatory duty of the prosecuting attorney for the county and district wherein the nuisance may exist to institute action in the circuit courts of this state to abate the public nuisance defined in § 16-105-303 in the manner provided in this subchapter.

History. Acts 1937, No. 118, § 3; Pope's Dig., § 10911; A.S.A. 1947, § 34-113; Acts 2003, No. 1185, § 222.

Amendments. The 2003 amendment substituted "circuit courts" for "chancery and circuit court" in (a); and deleted "chancery and" preceding "circuit courts" in (b).

16-105-305. Petition for abatement.

(a) Whenever a public nuisance, as defined in this subchapter, is kept, maintained, carried on, or exists in any county in this state, a bill or petition may be filed in any circuit court of the county, in the name of the State of Arkansas, by and upon the relation of any person named in § 16-105-304 against the person or persons keeping, maintaining, or carrying on the nuisance, and all aiders and abettors therein, and the owners, proprietors, or agents or persons or corporations, in charge or control of the building or place wherein the nuisance exists, for the purpose of having the nuisance abated and permanently discontinued.

(b) However, when the bill or petition is filed by electors and freeholders, they shall make bond in such sums as the court shall prescribe, conditioned to pay all costs and damages, in the event the court trying the case shall find and adjudge that the proceeding was instituted without probable cause. No bond for costs or damages shall be required when the proceeding is instituted by and upon the relation of the Attorney General or a prosecuting attorney for the state.

History. Acts 1937, No. 118, § 4; Pope's Dig., § 10912; A.S.A. 1947, § 34-114; Acts 2003, No. 1185, § 222.

Amendments. The 2003 amendment deleted "chancery or" preceding "circuit court" in (a); and substituted "court" for "judges or chancellors" in (b).

16-105-306. Hearings for temporary and permanent injunction — Bond — Notice.

(a)(1) The court, upon the presentation of a bill in the proceedings alleging that the nuisance complained of exists, shall award a temporary injunction, with such bond as required by law in cases where the bill is filed by citizens and electors and freeholders.

(2) However, no bond shall be required where bill or petition is filed by the officers mentioned in this subchapter if it shall be made to appear to the satisfaction of the court, by evidence in the form of a due and proper verification of the bill or petition under oath, or if affidavits, depositions, oral testimony, or otherwise, as the complainants or petitioners may elect, that the allegations of the bill or petition are true, enjoining and restraining the further continuance of the nuisance and the closing of the building or place wherein the nuisance is conducted until the further order of the court.

(b)(1) Five (5) days' notice in writing shall be given the defendant of the hearing of an application for a permanent injunction, but no notice shall be required of the hearing of a temporary injunction.

(2) If a hearing is continued at the instance of the defendant, the writ as prayed for shall be granted as a matter of course.

(3) When the injunction shall have been granted, it shall be binding upon the defendant throughout the county until modified or set aside by the court having cognizance of the case.

(4) Any violation thereof by the defendant, or upon his or her procurement, shall be a contempt of court and punished as provided in § 16-105-302.

History. Acts 1937, No. 118, § 5; Pope's Dig., § 10913; A.S.A. 1947, § 34-115; Acts 2003, No. 1185, § 222.

Amendments. The 2003 amendment deleted "judge or chancellor" following "the court" throughout; and deleted "or a judge or chancellor in vacation" following "The court" in (a)(1).

CASE NOTES

Time Limit.

The court has no power to order the closing of a building for any length of time except during the period from the granting of the temporary order until the final hearing of the petition for abatement and except by way of additional punishment for violation of the court's order enjoining the nuisance. Futrell v. State, 207 Ark. 452, 181 S.W.2d 680 (1944).

16-105-307. Hearings for temporary and permanent injunction — Evidence.

Upon the trial of all causes pursuant to this subchapter, evidence of the general reputation of the building or place where the nuisance is alleged to exist shall be admissible for the purpose of proving or tending to prove the existence of the nuisance.

History. Acts 1937, No. 118, § 6; Pope's Dig., § 10914; A.S.A. 1947, § 34-116; Acts 2003, No. 1185, § 222.

Amendments. The 2003 amendment deleted (a).

Cross References. Applicability of the Arkansas Rules of Civil Procedure, ARCP 81.

CASE NOTES

Evidence.

Testimony that drunks were seen around night club on several occasions, evidence of fighting, some evidence of gambling, and a lot of evidence of bad reputation of the club was held to support finding that place was a public nuisance. Foley v. State, 200 Ark. 521, 139 S.W.2d 673 (1940).

In action to abate operation of restaurant as a public nuisance, evidence was held sufficient to justify finding that beer and wine were sold, dancing permitted, and gambling carried on in the establishment. Portman v. State ex rel. Wood, 204 Ark. 349, 162 S.W.2d 67 (1942).

16-105-308. Order of abatement.

(a) If upon the trial of a cause pursuant to this subchapter, the existence of the nuisance is established, an order of abatement shall be entered as part of the judgment or decree of the court.

(b) The order shall direct the removal from the building or place wherein the nuisance exists or is maintained all means, appliances, fixtures, appurtenances, materials, supplies, and instrumentalities used for the purpose of conducting, maintaining, or carrying on the nuisance.

History. Acts 1937, No. 118, § 7; Pope's Dig., § 10915; A.S.A. 1947, § 34-117.

CASE NOTES

Scope of Order.

Initial order of abatement cannot provide for closing of establishment for a year; initial injunctive order can only provide for abatement of the nuisance and the more severe course of closing the establishment for a year is only authorized under § 16-105-302 for a violation of the initial order. Lawson v. State, 226 Ark. 170, 288 S.W.2d 585 (1956).

The court erred in its final order by denying the owner the right to operate her cafe premises in a legitimate and lawful manner and by further ordering that her place of business be kept padlocked for an indefinite period of time as the court's order was too broad, for this section contemplates that the initial order shall merely abate the nuisance. Siesta Cafe v. State, 231 Ark. 1004, 333 S.W.2d 722 (1960).

Where the final judgment perpetually enjoined the defendants from operating a dance hall and roadhouse upon the property but permitted its use for any other lawful purpose, they should have been given the opportunity to conduct their business in a lawful manner, for, if they failed to do so, the state had a prompt and effective remedy through the institution of contempt proceedings. B. & M. Land Co. v. State, 232 Ark. 815, 340 S.W.2d 395 (1960).

16-105-309. Proceedings against two or more owners.

(a) When one (1) of two (2) or more joint owners have been served with the notice prescribed in this subchapter, the cause shall proceed against the owner on whom notice has been served. The proceeding shall not be a bar to subsequent proceedings against one (1) or all of the joint owners not heretofore proceeded against.

(b) If the notice prescribed in this subchapter cannot be served on the owner or owners of the building or place that may become a nuisance under the provisions of this subchapter, by reason of nonresidence or otherwise, then and in that case, the notice may be served on any agent or agents or trustee that may have charge of or be in control of the building or place. The cause shall proceed against the agent, agents, or trustee in all respects as if he or they were the actual owner or owners of the building or place.

History. Acts 1937, No. 118, § 9; Pope's Dig., § 10917; A.S.A. 1947, § 34-119.

CASE NOTES

Husband and Wife.

In an action to have wife's place of business declared a public nuisance, the admissibility of the criminal record of the husband was not error because there was evidence that he also assisted in the operation of the cafe and exercised other acts of ownership. Siesta Cafe v. State, 231 Ark. 1004, 333 S.W.2d 722 (1960).

Subchapter 4 — Drugs

SECTION.
16-105-401. Title.
16-105-402. Common nuisance declared.
16-105-403. Action to abate — Permanent injunction.
16-105-404. Verification of complaint.
16-105-405. Temporary injunction.
16-105-406. Bond required — Exceptions.
16-105-407. Precedence of action — Exceptions.
16-105-408. Dismissal for want of prosecution.
16-105-409. Costs.
16-105-410. Order of abatement — Lien for costs — Enforcement.
16-105-411. Violations — Criminal penalties.
16-105-412. Order of abatement — Civil penalty — Damages.
16-105-413. Custody of building.
16-105-414. Fees — Closing of building or place.
16-105-415. Disposition of sale proceeds.
16-105-416. Release of building to owner.
16-105-417. Lien of fine — Enforcement.

Effective Dates. Acts 1989, No. 556, § 4: Mar. 14, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that buildings, locations, and places where drugs are used are a common nuisance and are proliferating in our State; that it is essential that local governments be authorized to abate such nuisances to prevent lawlessness and deterioration in neighborhoods and locales within their jurisdiction; that this Act is designed to accomplish this purpose and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and

effect from and after its passage and approval."

Acts 1991, No. 926, § 7: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that there has been a recent Pulaski County court case, City of Little Rock v. Jessie Martain, a.k.a. Jessie Hall, which indicated that there should be additional equitable remedies available to the judge to abate nuisances. That because of the above-referenced case, and because of the need to fight the war on drugs, an emergency is hereby declared to exist, and this act, being necessary for the preservation of the public peace, health and safety, shall become effective immediately upon passage."

Acts 1991, No. 1187, § 7: Apr. 10, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that there has been a recent Pulaski County court case, City of Little Rock v. Jessie Martain, a.k.a. Jessie Hall, which indicated that there should be additional equitable remedies available to the judge to abate nuisances. That because of the above-referenced case, and because of the need to fight the war on drugs, an emergency is hereby declared to exist, and this act, being necessary for the preservation of the public peace, health and safety, shall become effective immediately upon passage."

RESEARCH REFERENCES

UALR L.J. Survey, Property, 12 UALR L.J. 659.

16-105-401. Title.

This subchapter shall be called "The Arkansas Drug Abatement Act of 1989".

History. Acts 1989, No. 556, § 1.

16-105-402. Common nuisance declared.

Any store, shop, warehouse, dwelling house, building, boat, airplane, or any place whatever, used for the purpose of unlawfully selling, storing, keeping, manufacturing, using, or giving away any controlled substance, precursor, or analog specified in § 5-64-101 et seq., is declared detrimental to the public morals and shall be deemed a common nuisance which shall be enjoined, abated, and prevented, and for which costs of abatement and damages may be recovered.

History. Acts 1989, No. 556, § 1.

Cross References. Prostitution, § 5-70-102.

Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies, § 5-74-109.

Municipal corporations' powers and restrictions, § 14-54-102.

Criminal nuisance abatement boards, § 14-54-1701 et seq.

16-105-403. Action to abate — Permanent injunction.

Whenever there is reason to believe such a common nuisance is kept, maintained, or exists in any county, the prosecuting attorney of the county, in the name of the people, or the city attorney of any incorpo-

rated city, or any citizen of the state, resident of the county, in his or her own name, may maintain an action to abate and prevent the nuisance and perpetually to enjoin the person conducting or maintaining it and the owner, lessee, or agent of the building or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting the nuisance.

History. Acts 1989, No. 556, § 1; 1991, No. 926, § 1; 1991, No. 1187, § 1.

16-105-404. Verification of complaint.

Unless filed by the prosecuting attorney, or the city attorney of an incorporated city, the complaint in the action shall be verified.

History. Acts 1989, No. 556, § 1; 1991, No. 926, § 2; 1991, No. 1187, § 2.

16-105-405. Temporary injunction.

If the existence of the nuisance is shown in the action to the satisfaction of the court or judge, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of the nuisance. The notice requirements of Rule 65 of the Arkansas Rules Civil Procedure shall be followed in maintaining this action.

History. Acts 1989, No. 556, § 1.

16-105-406. Bond required — Exceptions.

On granting the temporary writ, the court or judge shall require a bond on the part of the applicant to the effect that the applicant will pay to the defendant enjoined such damages, not exceeding an amount to be specified, as the defendant sustains by reason of the injunction if the court finally decides that the applicant was not entitled to the injunction. No bond shall be required where the proceeding is instituted by the prosecuting attorney or city attorney.

History. Acts 1989, No. 556, § 1.

16-105-407. Precedence of action — Exceptions.

The action shall have precedence over all other actions, except criminal proceedings, election contests, and hearings on injunctions.

History. Acts 1989, No. 556, § 1.

16-105-408. Dismissal for want of prosecution.

If the complaint is filed by a citizen, it shall not be dismissed by him or her or for want of prosecution except upon a sworn statement made

by him and his attorney, setting forth the reasons why the action should be dismissed, and by dismissal ordered by the court.

History. Acts 1989, No. 556, § 1.

16-105-409. Costs.

If the action is brought by a citizen and the court finds there was no reasonable ground or cause for the action, the costs shall be taxed against that citizen.

History. Acts 1989, No. 556, § 1.

16-105-410. Order of abatement — Lien for costs — Enforcement.

If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment in the case, and plaintiff's costs in the action are a lien upon the building or place. The lien is enforceable and collectible by execution issued by order of the court.

History. Acts 1989, No. 556, § 1.

16-105-411. Violations — Criminal penalties.

A violation or disobedience of the injunction or order for abatement is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not less than one (1) nor more than six (6) months, or by both.

History. Acts 1989, No. 556, § 1.

16-105-412. Order of abatement — Civil penalty — Damages.

(a) If the existence of the nuisance is established in the action, an order of abatement shall be entered as a part of the judgment, which order shall direct the removal from the building or place of all fixtures and other movable property used in conducting, maintaining, aiding, or abetting the nuisance and shall direct their sale in the manner provided for the sale of chattels under execution.

(b) The order shall provide for any appropriate equitable relief as determined by the court to be necessary to abate said nuisance and may further provide, if determined to be the least restrictive alternative available to effectively accomplish said abatement, for the effectual closing of the building or place for such period of time as is determined to be necessary by the court as adequate to abate said nuisance. An alternative to closure may be considered only as provided in this section.

(c)(1) If the court finds that any vacancy resulting from closure of the building or place may create a nuisance or that closure is otherwise

harmful to the community, in lieu of ordering the building or place closed, the court may order the person who is responsible for the existence of the nuisance, or the person who knowingly permits controlled substances to be unlawfully sold, served, stored, kept, or given away in or from a building or place he or she owns, to pay damages in an amount equal to the fair market rental value of the building or place for such period of time as determined appropriate by the court to the city or county in whose jurisdiction the nuisance is located for the purpose of carrying out their drug prevention and education programs. If awarded to a city, eligible programs may include those developed as a result of cooperative programs among schools, community agencies, and the local enforcement agency. If awarded to a county, funds shall be used for those programs that are part of any county program in place or used by the county law enforcement agency. These funds shall not be used to supplant existing city, county, state, or federal resources used for drug prevention and education programs.

(2) For purposes of this subsection, the actual amount of rent being received for the rental of the building or place, or the existence of any vacancy therein, may be considered, but shall not be the sole determinant of the fair market rental value. Expert testimony may be used to determine the fair market rental value.

(d) In addition, the court may assess a civil penalty not to exceed five thousand dollars ($5,000) against any or all of the defendants, based upon the severity of the nuisance and its duration.

History. Acts 1989, No. 556, § 1; 1991, No. 926, § 3; 1991, No. 1187, § 3.

16-105-413. Custody of building.

While the order of abatement remains in effect, the building or place is in the custody of the court.

History. Acts 1989, No. 556, § 1.

16-105-414. Fees — Closing of building or place.

For removing and selling the movable property, the city, county, or responsible law enforcement agency is entitled to charge and receive the same fees as would be charged and received for levying upon and selling like property on execution; and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court.

History. Acts 1989, No. 556, § 1.

16-105-415. Disposition of sale proceeds.

The proceeds of the sale of the movable property shall be applied as follows:

(1) First — To the fees and costs of the removal and sale;

(2) Second — To the allowances and costs of closing and keeping closed the building or place;
(3) Third — To the payment of the plaintiff's costs in the action; and
(4) Fourth — The balance, if any, to the owner of the property.

History. Acts 1989, No. 556, § 1.

16-105-416. Release of building to owner.

(a) If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances that are a lien on the building or place and files a bond in the full value of the property conditioned that the owner will immediately abate any nuisance that may exist at the building or place and prevent it from being established or kept thereat within a period of one (1) year thereafter, the court or judge may, if satisfied of the owner's good faith, order the building or place to be delivered to the owner, and the order of abatement cancelled so far as it may relate to the property.
(b) The release of property under the provisions of this section does not release it from any judgment, lien, penalty, or liability to which it may be subject.

History. Acts 1989, No. 556, § 1.

16-105-417. Lien of fine — Enforcement.

(a) Whenever the owner of a building or place upon which the act or acts constituting the contempt have been committed, or the owner of any interest therein, has been guilty of a contempt of court, and fined in any proceedings under this subchapter, the fine is a lien upon the building or place to the extent of his interest in it.
(b) The lien is enforceable and collectible by execution issued by order of the court.

History. Acts 1989, No. 556, § 1.

Subchapter 5 — Noise Pollution

SECTION.
16-105-501. Definitions.
16-105-502. Sport shooting ranges.
16-105-503. Applicability.

Cross References. Regulation of use of firearms and archery equipment, § 14-16-501 et seq.

16-105-501. Definitions.

As used in this subchapter:

(1) "Local unit of government" means a county, city of the first class, city of the second class or incorporated town;

(2) "Person" means an individual, proprietorship, partnership, corporation, association, or other legal entity; and

(3) "Sport shooting range" or "range" means an area designed and operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting.

History. Acts 1997, No. 602, § 1.

16-105-502. Sport shooting ranges.

(a) Notwithstanding any other provision of law to the contrary, a person who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution for noise or noise pollution resulting from the operation or use of the range if the range is in compliance with noise control ordinances of local units of government that applied to the range and its operation at the time the range was constructed and began operation.

(b) A person who operates or uses a sport shooting range is not subject to an action for nuisance, and no court of the state may enjoin the use or operation of a range on the basis of noise or noise pollution, if the range is in compliance with noise control ordinances of units of local government that applied to the range and its operation at the time the range was constructed and began operation.

(c) A person who subsequently acquires title to or who owns real property adversely affected by the use of property with a permanently located sport shooting range shall not maintain a nuisance action against the person who owns the range to restrain, enjoin, or impede the use of the range unless there has been a substantial change in the nature of the use of the range or by a person using the range.

(d) Rules or regulations adopted by any state agency for establishing levels of noise allowable in the outdoor atmosphere shall not apply to a sport shooting range exempted from liability under this subchapter.

(e) Notwithstanding any other provision of law to the contrary, nothing in this subchapter shall be construed to limit civil liability except in the limited case of noise pollution.

History. Acts 1997, No. 602, § 2.

16-105-503. Applicability.

This subchapter does not affect rights or duties that matured, liabilities or penalties that were incurred, or proceedings begun before August 1, 1997.

History. Acts 1997, No. 602, § 3.

CHAPTER 106

ACTIONS BY OR AGAINST STATE

SUBCHAPTER.

1. General Provisions.
2. Prisoners — Court Actions.
3. Prisoners — Administrative Remedies.
4. Waiver of Sovereign Immunity.

Cross References. Actions by state to recover money, § 25-16-708.

Actions involving state to be brought in Pulaski county, § 16-60-103.

Property of state not liable to be seized and sold on execution, §§ 16-66-114, 16-66-205.

Recovery of state property, § 22-5-401.

State not required to give security for costs, § 16-68-304.

Suits against state prohibited, Ark. Const., Art. 5, § 20.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, A Guide to Arkansas Venue, 1995 Ark. L. Notes 83.

Subchapter 1 — General Provisions

SECTION.

16-106-101. Actions generally.
16-106-102. Actions against corporations.
16-106-103. Actions against officers, corporations, etc., for certain penalties.
16-106-104. Actions against sheriff, clerk, collector of the revenue, etc., for recovery of money.
16-106-105. Actions against state regarding federal land grants.
16-106-106. Setoff against state.
16-106-107. Enforcement of execution.
16-106-108. Disposition of state money.
16-106-109. Appeal and error by state.
16-106-110. Repayment of Attorney General or prosecuting attorney for postage used.

Publisher's Notes. Because Acts 1997, No. 371, added Subchapter 2, and Acts 1997, No. 851, added Subchapter 3, the existing provisions of this chapter have been designated as Subchapter 1.

Effective Dates. Acts 1855, § 13, p. 196: effective on passage.

Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875 (Adj. Sess.), No. 3, § 3: effective on passage.

16-106-101. Actions generally.

(a) All actions in favor of and in which the state is interested shall be brought in the name of the state and shall be prosecuted by the prosecuting attorney.

(b) All actions by or against the state shall be prosecuted and defended, proceeded in, and conducted to final judgment in the same manner as actions by and against individuals.

(c) Precedence shall be given, in all courts, to actions or other proceedings in which the state is a party, over any other business of the court.

(d) All actions for debts due the State of Arkansas, all actions in favor of any state officer, state board, or commissioner, in their official capacity, all actions which are authorized by the provisions of this code or by law to be brought in the name of the state, and all actions against the board, commissioner, or state officer for or on account of any official act done or omitted to be done shall be brought and prosecuted in the county where the defendant resides.

History. Rev. Stat., ch. 147, §§ 4, 5; Civil Code, §§ 484, 488; Acts 1871, No. 48, § 1 [484], p. 219; C. & M. Dig., §§ 1175, 9298, 9299, 9304; Pope's Dig., §§ 1397, 11984, 11985, 11990; A.S.A. 1947, §§ 34-201, 34-206, 34-208, 34-209.

Publisher's Notes. The term "this code" refers to the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

RESEARCH REFERENCES

Ark. L. Rev. Grounds For Venue in Arkansas — A Survey, 25 Ark. L. Rev. 468.

UALR L.J. Annual Survey of Caselaw, Civil Procedure, 24 UALR L.J. 893.

CASE NOTES

Analysis

In general.
Prosecution, etc. of actions.
Suits against state agency.
Suits not against state.
Venue where defendant resides.
—State officers.

In General.

Subsection (d) relates to venue rather than jurisdiction and is subject to the Administrative Procedure Act. Arkansas Sav. & Loan Ass'n Bd. v. Corning Sav. & Loan Ass'n, 252 Ark. 264, 478 S.W.2d 431 (1972).

Judge's discretion to control a docket is not completely obviated by subsection (c) of this section; therefore, state's petition for a writ of mandamus was denied where the state was seeking to remove a mayor from office under Ark. Const. art. 5, § 9 because the trial judge had the discretion to control the docket, and the judge was not required to postpone other cases where the state was not a party in order to accommodate the state. State v. Vittitow, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 402 (June 17, 2004).

Prosecution, Etc. of Actions.

The chancery court of Perry County had jurisdiction of a statutory action for discovery where the judgment sought to be enforced and the execution issued thereon were rendered and issued out of the circuit court of Perry County, although the defendants were not residents of or summoned in Perry County. Morgan Util. v. Perry County, 183 Ark. 542, 37 S.W.2d 74 (1931).

This section was not impliedly repealed by statute authorizing regulation and enforcement of liquor laws. Southwestern Distilled Products v. Trimble, 198 Ark. 970, 132 S.W.2d 196 (1939).

Suits Against State Agency.

Venue in suit against petitioner state administrative agency to have certain regulations it adopted declared unconstitutional had to be brought and prosecuted in the county where petitioner resided, pursuant to subsection (d), which for petitioner was in Pulaski County where petitioner's official residence was located. Arkansas Game & Fish Comm'n v.

Harkey, 345 Ark. 279, 45 S.W.3d 829 (2001).

Suits Not Against State.

Suit to prevent filing of assessment of contributions to unemployment fund and the resulting judgment, lien, and cloud on title of property, being not a suit against the state, was held properly instituted in the county of plaintiff's residence where its property was located. McCain v. Hammock, 204 Ark. 163, 161 S.W.2d 192 (1942).

While this section makes it mandatory that any action against the head of the state agency for public welfare be brought and prosecuted in Pulaski County, where he and the referee of the juvenile court of Pulaski County were only nominal or theoretical party defendants to the instant suit, a writ of habeas corpus seeking custody of the two minor children, and had no interest in it, the jurisdiction would be governed by the residence of the actual parties in interest, those having actual custody of the children when the suit was instituted. Johnson v. McClure, 228 Ark. 1081, 312 S.W.2d 347 (1958).

A quiet title action in which a state commission is made a defendant because of its claim to the land was not such an action against the state or a commission as falls within the purview of this section and, therefore, the proper county for the action was the county in which the land lies. State ex rel. Ark. Publicity & Parks Comm'n v. Butt, 229 Ark. 433, 316 S.W.2d 204 (1958).

Venue Where Defendant Resides.

Section 16-60-103, requiring all actions brought on the behalf of the state to be filed in county where seat of government is located, is superseded by this section, which requires all actions filed in behalf of the state to be filed in county of residence of defendant. Cook v. Gore, 214 Ark. 777, 218 S.W.2d 82 (1949).

Section 16-60-113, fixing venue of actions for damages to personal property due to negligence of another either in county where accident occurred or county where the owner of the property resides, applies only to persons and not the state, and does not amend this section which requires all actions brought in behalf of the state to be filed in county of where defendant resides. Cook v. Gore, 214 Ark. 777, 218 S.W.2d 82 (1949).

The venue of an action brought by a county in the name of the state to recover damages to county property against a foreign corporation admitted to do business in Arkansas and an individual resident of Pulaski County was in Pulaski County. Southwestern Bell Tel. Co. v. Roberts, 246 Ark. 864, 440 S.W.2d 208 (1969).

Action seeking a declaratory judgment interpreting a lease agreement did not involve recovery of an interest in real property and should have been brought by the state in the county of defendant's residence. Doyle v. Williams, 251 Ark. 797, 475 S.W.2d 170 (1972).

—State Officers.

The State Treasurer may not be sued except in the county of his official residence even though he is alleged to be a joint tortfeasor with defendant resident of another county in which suit is brought. Leonard v. Henry, 187 Ark. 75, 58 S.W.2d 430 (1933).

A mandamus proceeding against the State Land Commissioner to require him to perform a ministerial duty must be instituted in the county where such officer resides. Reed v. Wilson, 163 Ark. 520, 260 S.W. 438 (1924); Clark v. Trammell, 208 Ark. 450, 186 S.W.2d 668 (1945). See also Lewis v. Owen, 146 Ark. 469, 225 S.W. 648 (1920).

Where statute requires all actions against a state officer to be brought in the county of the officer's official residence, the word "officer" means one who holds an office, or specifically a person lawfully invested with an office. Downey v. Toler, 214 Ark. 334, 216 S.W.2d 60 (1948).

This section is not changed by § 16-60-102, which fixes the venue in actions against other public officers, except state officers, on the ground of "expressio unius est exclusio alterius," as it refers to actions against state officers and § 16-60-102 refers to actions against public officers. Downey v. Toler, 214 Ark. 334, 216 S.W.2d 60 (1948).

Members of the Arkansas State Police are state members and therefore can be sued only in the official residence of the state police, which is Pulaski County. Downey v. Toler, 214 Ark. 334, 216 S.W.2d 60 (1948).

Section 16-60-112, providing venue for all actions for damages for personal injuries as the county where the accident

occurred, did not change the venue as provided by this section and two state police officers were entitled to venue in Pulaski County, the official county residence for all state police. Downey v. Toler, 214 Ark. 334, 216 S.W.2d 60 (1948).

As the official residence of the gas board and its director is Pulaski County, the proper venue is Pulaski County. Liquefied Petroleum Gas Bd. v. Newton, 230 Ark. 267, 322 S.W.2d 67 (1959).

Taxpayer's suit against state police official in his official capacity for permitting individual to operate overweight trucks and to purchase improper licenses for trucks could only be maintained in Pulaski County, the official residence of the Arkansas State Police. Dean v. Cole, 236 Ark. 64, 364 S.W.2d 305 (1963).

Cited: Forrest City Mach. Works, Inc. v. Colvin, 257 Ark. 889, 521 S.W.2d 206 (1975).

16-106-102. Actions against corporations.

(a) Any action required by law to be brought in the name of the state against any corporation, or to vacate or repeal any charter, may be brought in any county in the state before any court having jurisdiction of the action.

(b) Service of process in any such action may be made in any county in the state upon any defendant to the action in like manner as is provided by law in other cases, and the defendant shall be required to appear and defend the action in the county where the action may be commenced.

History. Acts 1875 (Adj. Sess.), No. 3, §§ 1, 2, p. 4; C. & M. Dig., §§ 1181, 1182; Pope's Dig., §§ 1403, 1404; A.S.A. 1947, §§ 34-202, 34-203.

16-106-103. Actions against officers, corporations, etc., for certain penalties.

Where officers, corporations, or officers of corporations are required to report to the Auditor of State the moneys in their hands belonging to the state or due by them or by a corporation to the state, at a certain period or periods fixed by law, and a fine or penalty is imposed for the failure, the action for the recovery thereof may be commenced at any time after the failure.

History. Civil Code, § 486; C. & M. Dig., § 9301; Pope's Dig., § 11987; A.S.A. 1947, § 34-205.

16-106-104. Actions against sheriff, clerk, collector of the revenue, etc., for recovery of money.

When the debt is due by a sheriff, clerk, or the Director of the Department of Finance and Administration, Division of Revenue, or any other receiver of public moneys, for money collected or received, and the officer, collector, or receiver has failed to pay the money in the manner and at the time prescribed by law, the action for the recovery of the debt may be commenced at any time after the failure.

History. Civil Code, § 485; C. & M. Dig., § 9300; Pope's Dig., § 11986; A.S.A. 1947, § 34-204.

16-106-105. Actions against state regarding federal land grants.

(a) All actions and suits for the recovery of the purchase money of lands which were granted to this state by the United States by Acts of Congress, March 2, 1827, June 23, 1836, and September 4, 1841, and any and all lands which have at any time, and from time to time, been granted to this state by the United States for any and all purposes, except grants made for railroad purposes, and all actions to enforce the vendor's lien upon the lands, and all actions to recover the possession of, or for trespasses upon, the lands, shall be brought and prosecuted in the name of the State of Arkansas.

(b) The fact that any and all of the lands may have been set apart, allotted, or granted by the state to any county, township, or school district shall not be a defense to any action brought under this section and shall not affect the jurisdiction of the court in which the action may be pending, but all questions as to the rights of the counties, townships, or school districts shall be reserved.

History. Civil Code, § 29; C. & M. Dig., § 1094; Pope's Dig., § 1310; A.S.A. 1947, § 34-207.

16-106-106. Setoff against state.

In suits brought in behalf of the state, no debt or claim shall be allowed as a setoff other than those which have been exhibited to the Auditor of State and by him or her allowed, except only in cases when it shall be proven to the satisfaction of the court that the defendant at the time is in possession of vouchers which he could not produce to the Auditor of State or that he was prevented from exhibiting the claims to the Auditor of State in consequence of sickness or absence.

History. Rev. Stat., ch. 18, § 13; C. & M. Dig., § 9303; Pope's Dig., § 11989; A.S.A. 1947, § 34-210.

16-106-107. Enforcement of execution.

(a) Whenever an execution against a public debtor shall not be satisfied in the regular course of proceeding and the Attorney General or prosecuting attorney is of the opinion that the lack of satisfaction is caused by fraudulent concealment of the debtor's property, or by any other obstruction thereto, he or she may cause actions to be brought, either in the court in which the judgment was obtained or in any other circuit court within whose jurisdiction the property may be, or the debtor may be found, to set aside the fraudulent conveyances, to remove any obstructions to the execution, or to obtain satisfaction of the judgment.

(b) For the purpose of bringing an action, the Attorney General or the prosecuting attorney may employ an attorney to bring the action, or an agent to prepare the suit and attend to the collection of the judgment, and may agree as to a compensation to be paid for their services, either certain or contingent on success. However, the amount of the contingent compensation shall not exceed twenty percent (20%) on the first three hundred dollars ($300) and ten percent (10%) on any excess over that amount. When the compensation is due, the Auditor of State, upon the certificate of the Attorney General or prosecuting attorney, shall issue a warrant on the Treasurer of State.

History. Civil Code, § 489; Acts 1871, No. 48, § 1 [489], p. 219; C. & M. Dig., § 9305; Pope's Dig., § 11991; A.S.A. 1947, § 34-211.

16-106-108. Disposition of state money.

(a) The sheriff or other officer collecting any money due to the state shall pay the money into the State Treasury and obtain a final discharge therefor. No money due the state shall be paid to the Attorney General or any other attorney or agent employed in the collection of the money, or to any other person, unless otherwise directed by law.

(b) The court rendering a judgment in favor of the state shall certify the amount thereof, together with the costs, to the Auditor of State and shall also certify the fees due to officers and to witnesses for attendance on behalf of the state, for which the Auditor of State shall issue his or her warrant on the Treasurer of State to the person entitled.

History. Civil Code, §§ 490, 491; C. & M. Dig., §§ 9306, 9307; Pope's Dig., §§ 11992, 11993; A.S.A. 1947, §§ 34-212, 34-213.

CASE NOTES

Applicability.

The words "the sheriff or other officer collecting any money due to the state shall pay the money into the public treasury" have reference solely to the state itself and not to any of its political subdivisions. Williams v. State, 65 Ark. 159, 46 S.W. 186 (1898).

16-106-109. Appeal and error by state.

(a) Appeals and writs of error may be brought by any of the prosecuting attorneys, in the name and on behalf of the state, in like manner as by individuals, except when it may be otherwise provided by law.

(b) All appeals or writs of error taken or prosecuted by the state shall, ipso facto, operate as a supersedeas and suspension of all further proceedings in the cause in which the appeal may be taken or writ of error sued out, until the final disposition thereof, without bond, recognizance, or security.

(c) In no case where the state applies for an injunction shall security be required. However, if the state is entitled thereto in other respects,

the injunction may be granted according to the justice and equity of the case.

History. Rev. Stat., ch. 117, § 4; Acts 1855, § 10, p. 196; C. & M. Dig., 2142, 9308; Pope's Dig., §§ 2748, 11994; A.S.A. 1947, §§ 34-214, 34-215.

Cross References. Stay of proceedings to enforce a judgment, ARCP 62.

CASE NOTES

Criminal Cases.

An appeal lies in a felony on behalf of the state from a judgment sustaining a motion in arrest of a judgment of conviction. State v. Robinson, 55 Ark. 439, 18 S.W. 541 (1892).

Cited: State ex rel. Greene County Bar Ass'n v. Huddleston, 173 Ark. 686, 293 S.W. 353 (1927); State v. One 1993 Toyota Camry, 333 Ark. 503, 969 S.W.2d 663 (1998).

16-106-110. Repayment of Attorney General or prosecuting attorney for postage used.

The Attorney General or prosecuting attorney may make out and certify to the Auditor of State an account of the postage he may have paid in sending out notices and process, and upon letters sent or received by him, relating to actions or proceedings in which the state is interested, who shall thereupon issue his or her warrant on the Treasurer for the amount thereof.

History. Civil Code, § 492; Acts 1871, No. 48, § 1 [492], p. 219; C. & M. Dig., § 4533; Pope's Dig., § 5590; A.S.A. 1947, § 34-216.

Subchapter 2 — Prisoners — Court Actions

SECTION.
16-106-201. Definitions.
16-106-202. Premature, frivolous, or malicious lawsuits.
16-106-203. Sanctions.
16-106-204. Fees and costs.

Effective Dates. Acts 1997, No. 371, § 8: Mar. 6, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that litigation of a frivolous nature by incarcerated persons is flooding the State court systems. Therefore in order to immediately implement this measure, and thereby alleviate the burden on the court systems, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-106-201. Definitions.

As used in this subchapter:

(1) "Frivolous" means having no reasonable basis in law or fact, or lacking any good faith legal argument for the extension, modification, or reversal of existing law;

(2) "Inmate" or "inmate in a penal institution" includes, but is not limited to, a person in the custody or under the supervision of the Department of Correction, the Department of Community Correction, or the Federal Bureau of Prisons; and

(3) "Malicious" means filing numerous actions, or actions brought in bad faith on de minimis issues.

History. Acts 1997, No. 371, § 2.

A.C.R.C. Notes. Acts 2001, No. 323, § 1, provided: "Legislative intent. The General Assembly, in Act 549 of 1993, established the Arkansas Department of Community Punishment and delineated its purposes. Confusion in the public's perception, with regard to the purposes of the department, exists and will persist because of the inconsistency between the name of the department and its established purposes. The purpose of this act is to provide the department with a name that more accurately describes its role as an agency that is intended to fulfill the legislatively established purposes of supervision, treatment, rehabilitation, and restoration of adult offenders as useful law-abiding citizens within the community and to provide its supervisory board with a name consistent with the department's name change."

Acts 2001, No. 323, § 2, provided: "The 'Department of Community Punishment,' as established in Arkansas Code 12-27-125, shall hereafter be known as the 'Department of Community Correction'."

Acts 2001, No. 323, § 5, provided: "(a) The Arkansas Code Revision Commission shall make appropriate name changes in the Arkansas Code to implement this act.

"(b) The Arkansas Code Revision Commission is not required to codify this act."

16-106-202. Premature, frivolous, or malicious lawsuits.

(a) A civil action or claim initiated against the state, the Board of Corrections, the Department of Correction, the Department of Community Correction, another state agency, or a political subdivision, or an original action in an appellate court, or an appeal of an action, whether or not the plaintiff was represented in court, by an inmate in a penal institution or an incarcerated person appearing pro se may be:

(1) Dismissed without prejudice by the court on its own motion or on a motion of the defendant, if all administrative remedies available to the inmate have not been exhausted; or

(2) Dismissed with prejudice by the court on a motion of the defendant if the court is satisfied that the action is frivolous or malicious.

(b) For purposes of this section, "civil action" shall not include a petition for a writ of habeas corpus or other petition for post-conviction release in which the court is jurisdictionally empowered to grant release from incarceration or a reduction in sentence.

History. Acts 1997, No. 371, § 1.

A.C.R.C. Notes. Acts 2001, No. 323, § 1, provided: "Legislative intent. The General Assembly, in Act 549 of 1993, established the Arkansas Department of Community Punishment and delineated its purposes. Confusion in the public's perception, with regard to the purposes of the department, exists and will persist because of the inconsistency between the name of the department and its established purposes. The purpose of this act is to provide the department with a name that more accurately describes its role as

an agency that is intended to fulfill the legislatively established purposes of supervision, treatment, rehabilitation, and restoration of adult offenders as useful law-abiding citizens within the community and to provide its supervisory board with a name consistent with the department's name change."

Acts 2001, No. 323, § 2, provided: "The 'Department of Community Punishment,' as established in Arkansas Code 12-27-125, shall hereafter be known as the 'Department of Community Correction'."

Acts 2001, No. 323, § 3, provided: "The 'Board of Correction and Community Punishment,' as established in Arkansas Code 12-27-104 and 16-93-1203, shall hereafter be known as the 'Board of Corrections'."

Acts 2001, No. 323, § 5, provided: "(a) The Arkansas Code Revision Commission shall make appropriate name changes in the Arkansas Code to implement this act.

"(b) The Arkansas Code Revision Commission is not required to codify this act."

16-106-203. Sanctions.

If the court determines before or at trial that one (1) or more of the causes of action are frivolous or malicious, any one (1) or more of the following sanctions may be imposed:

(1) Award attorney fees and actual costs incurred by the state, the Department of Correction, or the Department of Community Correction, another state agency, a political subdivision, the Attorney General's office, or the defendant, not to exceed two thousand five hundred dollars ($2,500) per frivolous cause of action;

(2) Court costs not to exceed five hundred dollars ($500) per cause of action;

(3) Order the Department of Correction to revoke up to thirty (30) days' earned good-time credits accrued, under § 12-29-201, et seq.

(4) Order the department to revoke permission to have nonessential personal property of the inmate, including, but not limited to, televisions, radios, stereos, or tape recorders. If permission is revoked, the department shall take appropriate precautions to protect the property during the period of the revocation; or

(5) Impose a civil sanction in an amount not to exceed one thousand dollars ($1,000).

History. Acts 1997, No. 371, § 3.

A.C.R.C. Notes. Acts 2001, No. 323, § 1, provided: "Legislative intent. The General Assembly, in Act 549 of 1993, established the Arkansas Department of Community Punishment and delineated its purposes. Confusion in the public's perception, with regard to the purposes of the department, exists and will persist because of the inconsistency between the name of the department and its established purposes. The purpose of this act is to provide the department with a name that more accurately describes its role as an agency that is intended to fulfill the legislatively established purposes of supervision, treatment, rehabilitation, and restoration of adult offenders as useful law-abiding citizens within the community and to provide its supervisory board with a name consistent with the department's name change."

Acts 2001, No. 323, § 2, provided: "The 'Department of Community Punishment,' as established in Arkansas Code 12-27-125, shall hereafter be known as the 'Department of Community Correction'."

Acts 2001, No. 323, § 5, provided: "(a) The Arkansas Code Revision Commission shall make appropriate name changes in the Arkansas Code to implement this act.

"(b) The Arkansas Code Revision Commission is not required to codify this act."

16-106-204. Fees and costs.

(a) Any award of attorney's fees or costs, or the imposition of a sanction shall serve as a judgment against the inmate, and the department is authorized to take up to fifty percent (50%) of the inmate's account per month until paid.

(b) The judgment shall be subject to execution without further order of any court for a period of ten (10) years from the date of an award or imposition of a sanction.

History. Acts 1997, No. 371, § 4.

Subchapter 3 — Prisoners — Administrative Remedies

SECTION.
16-106-301. Exhaustion of administrative remedies required.
16-106-302. Sanctions for frivolous, malicious, or wasteful claim.

Effective Dates. Acts 1997, No. 851, § 6: Mar. 27, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that litigation of a frivolous nature by incarcerated persons is flooding the state court systems. Therefore, in order to immediately implement this measure, and thereby alleviate the burden on the court systems, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-106-301. Exhaustion of administrative remedies required.

No action shall be brought with respect to prison conditions under Section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other federal law, by an incarcerated person, defined for purposes of this subchapter as a person who has been convicted of a crime and is incarcerated for that crime or is being held in custody for trial or sentencing, until such administrative remedies as are available are exhausted, provided, that the statute of limitations is tolled during the period of time the application for the administrative remedies is pending.

History. Acts 1997, No. 851, § 1.

16-106-302. Sanctions for frivolous, malicious, or wasteful claim.

(a) The court shall, on its own motion or on the motion of a party, dismiss any action brought with respect to prison conditions under Section 1979 of the Revised Statutes of the United States, 42 U.S.C.

§ 1983, or any other federal law, by any incarcerated person if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(b) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

History. Acts 1997, No. 851, § 2.

CASE NOTES

Cited: Brown v. Arkansas Dep't of Cor., 339 Ark. 458, 6 S.W.3d 102 (1999).

Subchapter 4 — Waiver of Sovereign Immunity

SECTION.

16-106-401. Settlement negotiations.
16-106-402. Communications regarding claims or litigation.

Effective Dates. Acts 2003, No. 298, § 3: Mar. 4, 2003. Emergency clause provided: "It is found and determined by the General Assembly that in the case of Lake View School District No. 25 of Phillips County v. Mike Huckabee, et al., 340 Ark. 481 (2000), the Supreme Court held that the state waived its sovereign immunity by offering a proposed settlement in a class action case that, if approved by the trial court, would have provided for payment by the state of attorneys' fees to counsel for the plaintiff class representative; the Supreme Court further held that such waiver of immunity survived even though the proposed settlement was rejected by the trial court and the Supreme Court. It is further found and determined by the General Assembly that the Supreme Court's decision has a chilling effect on the ability and willingness of the state and its attorneys to discuss, propose, negotiate or communicate with regard to potential settlement of class action and other pending or threatened claims or litigation. It is further found and determined by the General Assembly that such chilling effect will hinder or deter settlement of pending or threatened litigation in which the state is involved and is, therefore, contrary to sound public policy. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

16-106-401. Settlement negotiations.

The State of Arkansas does not waive its sovereign immunity when, through its counsel or otherwise, it enters into negotiations concerning the possible settlement of pending or threatened claims or litigation,

whether the pending or threatened claims or litigation are governed by Rule 23 of the Arkansas Rules of Civil Procedure, Rule 23 of the Federal Rules of Civil Procedure, or otherwise.

History. Acts 2003, No. 298, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Waiver of Sovereign Immunity, 26 UALR L.J. 441.

16-106-402. Communications regarding claims or litigation.

The State of Arkansas does not waive its sovereign immunity when, through its counsel or otherwise, it communicates to a court, counsel, or citizens, or otherwise, with respect to the possibility of settling, on any terms or conditions, any pending or threatened claims or litigation, whether the pending or threatened claims or litigation are governed by Rule 23 of the Arkansas Rules of Civil Procedure, the Federal Rules of Civil Procedure, or otherwise.

History. Acts 2003, No. 298, § 2.

CHAPTER 107

ACTIONS INVOLVING BONDS, NOTES, ETC.

SUBCHAPTER.
1. General Provisions.
2. Actions on Bonds.
3. Sureties' Remedies.

Subchapter 1 — General Provisions

SECTION.
16-107-101. Liability of surety upon forgery, erasure, or withdrawal of cosurety's name.
16-107-102. Signature of surety conditional upon signature of cosurety no defense — Liability.

16-107-101. Liability of surety upon forgery, erasure, or withdrawal of cosurety's name.

If it appears that the name of any person has been signed to any bond or other obligation as surety thereon without his consent, or that the name of any person which has been at any time properly signed as surety to any bond or obligation has been erased or withdrawn therefrom before delivery thereof, without the consent of other persons signing the bond or other obligation as sureties prior or subsequently to the erasure or withdrawal, the signing without authority or erasure or withdrawal shall not have the effect of rendering the bond or other obligation void as to all of the other obligors thereon. The sole effect thereof shall be to diminish the extent of the liability of the sureties

thereon, other than those whose names may have been so signed without authority or erased as aforesaid, by an amount equal to that which would have been contributed to discharge the common liability by the persons whose names were so signed without authority, or erased as aforesaid, had the want of authority, or erasure not existed.

History. Acts 1891, No. 55, § 1, p. 91; C. & M. Dig., § 8283; Pope's Dig., § 10860; A.S.A. 1947, § 34-328.

CASE NOTES

Forgery.

Where the names of three persons appearing as sureties were forged, the action as to them must be dismissed and the liability of the remaining sureties reduced proportionately. Johnson v. T.M. Dover Merc. Co., 164 Ark. 371, 261 S.W. 913 (1924).

Where defense was that none of the defendants signed the bond, an instruction that the signature of one of the defendants being forged would relieve the other defendants from liability was properly refused, although such forgery would diminish the liability of the other defendants by an amount equal to that which would have been contributed by the defendant whose name was forged. Bauer v. North Ark. Hwy. Imp. Dist. No. 1, 168 Ark. 220, 270 S.W. 533 (1925).

16-107-102. Signature of surety conditional upon signature of cosurety no defense — Liability.

(a) It shall not be a defense in favor of any surety on any bond or obligation that he became surety thereon on the condition that the principal obligor should procure the cosuretyship of other persons before the instrument should be delivered. This shall be the case whether the names of the contemplated cosureties appear upon the face of the instrument at the time the condition is stated or are specified in an independent agreement or understanding.

(b) In case of every failure to procure the joinder of the contemplated cosureties, the liability of the sureties who actually sign the bond or other obligation shall be as complete and valid as if no condition had been mentioned. The instrument to which their names are signed shall be deemed and taken to all intents and purposes as their obligation.

History. Acts 1891, No. 55, § 2, p. 91; C. & M. Dig., § 8296; Pope's Dig., § 10873; A.S.A. 1947, § 34-329.

Subchapter 2 — Actions on Bonds

SECTION.
16-107-201. Applicability.
16-107-202. Breach of condition to pay money.
16-107-203. Breach of condition other than to pay money.
16-107-204. Subsequent breaches.
16-107-205. Official bonds generally.
16-107-206. Official bonds — Subsequent breaches.
16-107-207. Official bonds — Plea and liability of surety.
16-107-208. Official bonds — Judgment.

Cross References. Actions brought in county where cause of action arose, § 16-60-102.

RESEARCH REFERENCES

ALR. Liability of surety on private bond for punitive damages. 2 ALR 4th 1254.

Recovery of damages from wrongful issuance of injunction as limited to amount of bond. 30 ALR 4th 273.

Am. Jur. 12 Am. Jur. 2d, Bonds, § 33 et seq.

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

16-107-201. Applicability.

(a) The provisions of this subchapter in relation to suits on official bonds shall apply as well to suits on bonds of administrators, executors, guardians, and others required by law to give bond, with condition for the performance of any duty or trust, as to suits on bonds of officers.

(b) The persons aggrieved may prosecute suits in the same manner, with like effect, and subject in all respects to the provisions contained in this subchapter, in respect to suits on official bonds.

(c) The court shall possess the same power in relation to the suits.

History. Rev. Stat., ch. 112, § 27; C. & M. Dig., § 8186; Pope's Dig., § 10617; A.S.A. 1947, § 34-327.

CASE NOTES

Fixed Penalty.

A surety bond under a fixed penalty who fails to make payment when liability attaches subjects himself to interest even though its payment will exceed the penalty. James v. State, 65 Ark. 415, 46 S.W. 937 (1898).

16-107-202. Breach of condition to pay money.

(a) In all actions brought upon bonds to which there is a condition or defeasance annexed by which the bond is to become void on the payment of a less sum, the plaintiff shall set out the condition in his or her complaint and may assign as many breaches as he or she may think proper.

(b) The defendant in the action may plead payment of the principal sum and interest due by the condition of the bond before the commencement of the action in bar thereof, although the payment was not strictly according to the condition.

(c) Whenever any action shall be pending on the bond, the defendant may, at any time before judgment rendered in the action, pay to the plaintiff, or bring into court for the plaintiff's use, the principal sum and

interest due on the bond, together with the costs in the action, and thereupon the action shall be discontinued.

(d) If judgment is recovered on any such bond, the judgment shall be rendered for the sum of money really due, according to the condition, with interest and costs, and execution shall issue thereon accordingly.

History. Rev. Stat., ch. 112, §§ 1-4; C. & M. Dig., §§ 8164-8166; Pope's Dig., §§ 10595-10597; A.S.A. 1947, §§ 34-301 — 34-304.

16-107-203. Breach of condition other than to pay money.

(a) When an action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for payment of money, or shall be prosecuted for any penal sum for the nonperformance of any covenant or written agreement, the plaintiff in his or her complaint shall assign the specific breaches for which the action is brought.

(b) Upon the trial of the action if the jury finds that any assignment of the breaches is true, they shall assess the damages occasioned by the breach, in addition to their finding.

(c) If, in the action, the plaintiff shall obtain judgment upon demurrer, by confession or default, the court shall make an order therein that the truth of the breaches assigned be inquired into and the damages sustained thereby assessed, at the same or the next term, and the court shall proceed thereon in the same manner as in other cases of inquiry of damages.

(d) In every action, if the plaintiff recovers, the verdict assessing the damages shall be entered on the record, and judgment shall be entered for the penalty of the bond, or for the penal sum forfeited, together with costs of suit, and with a further judgment that the plaintiff have execution for the damages so assessed, which damages shall be specified in the judgment.

(e) The execution on the judgment shall be in the usual form, reciting the recovery, and directing the sheriff to levy the amount of damages so assessed, which amount shall be stated with interest thereon from the time of the assessment, and the costs of the suit.

(f)(1) If the amount so directed to be levied shall be collected or otherwise paid or satisfied, the real and personal estate and body of the defendant shall be exonerated from further liability for the damages so assessed.

(2) However, the judgment rendered for the penalty of the bond shall remain as a security for any damages that may be thereafter sustained by the further breach of any condition of the bond or the nonperformance of any other covenant or written agreement by the defendant, the performance of which was secured by the penal sum.

History. Rev. Stat., ch. 112, §§ 5-10; C. & M. Dig., §§ 8167-8171; Pope's Dig., §§ 10598-10602; A.S.A. 1947, §§ 34-305 — 34-310.

CASE NOTES

Jury Determinations.

The jury must be sworn to inquiry into the truth of the breaches, as well as to assess the damages. Phillips & Martin v. Governor, 2 Ark. 382 (1840); Adams v. State, 6 Ark. 497 (1846). See also McLain v. Taylor, 9 Ark. 358 (1849); Lee v. Leech, 9 Ark. 423 (1849).

16-107-204. Subsequent breaches.

(a) Whenever further breaches shall occur, the plaintiff or his of her personal representative may have a scire facias upon the judgment, suggesting the breaches against the defendant, and all parties bound thereby, and commanding that they be summoned to show cause why an execution should not be had upon the judgment for the amount of damages sustained by the further breaches.

(b) The like proceedings to ascertain damages shall be had upon the writ, as provided in the original suit on the bond. If the plaintiff recovers, judgment shall be rendered that the plaintiff have execution to collect the amount of damages assessed and costs.

(c) The execution issued on the judgment shall have like effect and be proceeded on in all things as in the first instance. However, the judgment shall remain as a security for further breaches, and so on, as often as occasion may require.

(d) Whenever in any action brought according to the provisions of this subchapter the jury finds that any assignment of breaches is not true, this finding shall be a bar to any other or further suit by scire facias or otherwise, for the recovery of any damages alleged to have been sustained by occasion of the same breaches so assigned.

History. Rev. Stat., ch. 112, §§ 11-14; C. & M. Dig., §§ 8172-8175; Pope's Dig., §§ 10603-10606; A.S.A. 1947, §§ 34-311 — 34-314.

16-107-205. Official bonds generally.

(a) In all cases where by the laws of this state, any person is authorized to prosecute a suit to his or her own use on any official bond, he shall sue in the name of the state or other obligee named in the bond, stating in the process, pleadings, proceedings, and record in the action, that the suit is brought for the use of the person suing.

(b) In the actions, the same pleadings and proceedings shall be had as before provided in cases of suits upon bonds with conditions other than for the payment of money, except as otherwise provided in this subchapter.

(c) A judgment for the defendant in the action shall be a bar to any other suit that may be brought on the same official bond for the use of the same person for any delinquency or default which was assigned as a breach of the condition of the bond in the action in which the judgment was rendered.

(d) Any other party aggrieved may in like manner prosecute an action on an official bond, and the pendency of any suit for the use of any other person on the same bond, or a judgment recovered by or

against any other person on the bond, shall not abate or in any manner affect the suit or the proceedings therein, except as otherwise provided in this subchapter.

(e) Every suit brought on an official bond to the use of the party aggrieved and every judgment thereon shall be deemed the private suit and judgment of the relator, in the same manner as if he or she were the nominal plaintiff, and the relator shall be liable for costs as other plaintiffs.

History. Rev. Stat., ch. 112, §§ 15-18, 21; C. & M. Dig., §§ 8176-8178; Pope's Dig., §§ 10607-10609; A.S.A. 1947, §§ 34-315 — 34-318, 34-321.

16-107-206. Official bonds — Subsequent breaches.

(a) Any person who may have recovered any judgment upon an official bond may, in like manner, again prosecute an action on the bond whenever he or she may be aggrieved by any default or delinquency, other than such as shall have been the subject of a former suit, and shall proceed as provided in this subchapter.

(b) No scire facias shall be brought upon any judgment rendered upon an official bond, by the same or any other relator, for any breach of the condition of the bond.

History. Rev. Stat., ch. 112, §§ 19, 20; C. & M. Dig., §§ 8179, 8180; Pope's Dig., §§ 10610, 10611; A.S.A. 1947, §§ 34-319, 34-320.

16-107-207. Official bonds — Plea and liability of surety.

(a) No suit shall be barred nor shall the amount which the plaintiff shall be entitled to recover be affected by any plea made by any surety in the bond of a former judgment recovered thereon unless it is accompanied by an allegation that the sureties, or some of them, have been obliged to pay the damages on the judgment, or some part thereof, for the want of sufficient property of the principal whereon to levy the damages, or that they will be obliged to pay the damages, or a part thereof, for the same reason; nor unless the plea is verified by oath.

(b) If it shall appear that the amount of damages so recovered which a security has been or will be obliged to pay, as specified in subsection (a) of this section, is equal to the amount for which the defendant shall be liable by virtue of the bond, he or she shall be acquitted and discharged from all further liability, and judgment rendered in his of her favor.

(c) If it shall appear that the amount of damages so recovered and which the surety has paid or will be obliged to pay is not equal to the amount of his or her liability, the amount thereof shall be allowed to him or her in estimating the extent of his liability in the action.

History. Rev. Stat., ch. 112, §§ 22-24; C. & M. Dig., §§ 8181-8183; Pope's Dig., §§ 10612-10614; A.S.A. 1947, §§ 34-322 — 34-324.

16-107-208. Official bonds — Judgment.

(a) Whenever a judgment shall be obtained on any official bond, against principal and sureties, a direction shall be endorsed on the execution, by the plaintiff or his or her attorney, to levy the amount, in the first place, on the property of the principal and, if sufficient property of the principal cannot be found to satisfy the execution, then to levy the deficiency on the property of the sureties.

(b) If several judgments are obtained at the same time upon any official bond for damages amounting in the whole to more than the sum for which the sureties are liable, the court shall order the moneys levied from the property of the sureties on the judgments to be divided and distributed among the persons to whose use the judgments were rendered respectively, in proportion to the amount of their respective recoveries.

History. Rev. Stat., ch. 112, §§ 25, 26; C. & M. Dig., §§ 8184, 8185; Pope's Dig., §§ 10615, 10616; A.S.A. 1947, §§ 34-325, 34-326.

Subchapter 3 — Sureties' Remedies

SECTION.
16-107-301. Action against principal to discharge debt.
16-107-302. Action against principal before debt due.
16-107-303. Recovery of money and property from principal debtor.
16-107-304. Action against cosurety.
16-107-305. Judgment against principal on motion.
16-107-306. Action against executors and administrators.

RESEARCH REFERENCES

UALR L.J. Murphey, Twenty Years After: Reflections on the Uniform Commercial Code in Arkansas — Articles 3 and 4, 7 UALR L.J. 523.

16-107-301. Action against principal to discharge debt.

A surety may maintain an action against his or her principal to compel the principal to discharge the debt or liability for which the surety is bound after the debt or liability has become due.

History. Civil Code, § 749; C. & M. Dig., § 8284; Pope's Dig., § 10861; A.S.A. 1947, § 34-330.

CASE NOTES

Analysis

In general.
Applicability.
Jurisdiction.
Nature of action.

In General.

This remedy is supplemental to the remedy in equity. Rice v. Dorrian, 57 Ark. 541, 22 S.W. 213 (1893).

Applicability.

An indorser on a note is not a "surety" within this section. Rice v. Dorrian, 57 Ark. 541, 22 S.W. 213 (1893).

Jurisdiction.

The mutual rights and obligations of sureties were first determined in courts of chancery and enforceable there alone; it is still the more appropriate form, from its more flexible means of adjustment, but courts of law have long assumed a concurrent cognizance of their rights and will enforce them. Gordon v. Moore, 44 Ark. 349 (1884).

Equity has jurisdiction to compel a principal to exonerate surety. Uptmoor v. Young, 57 Ark. 528, 22 S.W. 169 (1893).

Nature of Action.

A surety has no implied authority to sue his principal in the name of the creditor for whose debt he is surety; rather, he has an action for indemnity. Caruth-Byrnes Hdwe. Co. v. Deere, Mansur & Co., 53 Ark. 140, 13 S.W. 517 (1890).

16-107-302. Action against principal before debt due.

(a) A surety may maintain an action against his principal to obtain indemnity against the debt or liability for which the surety is bound, before it is due, whenever any of the grounds exist upon which, by the provisions of §§ 16-109-102 [repealed], 16-110-101, 16-110-104, 16-110-202, or 16-110-203, an order may be made for arrest and bail, or for attachment.

(b) In the action the surety may obtain any of the provisional remedies in Title VIII of the Code of Practice in Civil Cases upon the ground and in the manner prescribed therein.

History. Civil Code, §§ 750, 751; C. & M. Dig., §§ 8285, 8286; Pope's Dig., §§ 10862, 10863; A.S.A. 1947, §§ 34-331, 34-332.

Publisher's Notes. Title VIII of the Code of Practice in Civil Cases of 1869 was comprised of §§ 173-333. See parallel reference tables in the tables volume.

CASE NOTES

Analysis

Constitutionality.
Release of sureties.
Removal of principal.

Constitutionality.

This section is constitutional. Ruddell v. Childress, 31 Ark. 511 (1876).

Release of Sureties.

A release of a surety is no release of the principal; a release of one of two sureties is a release of the other from one-half the liability. Gordon v. Moore, 44 Ark. 349 (1884).

Agreement of the holder with the maker, upon a valuable consideration, to extend time of payment without consent of the surety will discharge the surety. Vestal v. Knight, 54 Ark. 97, 15 S.W. 17 (1891).

Removal of Principal.

The sureties of an executor who has converted the assets into money and chooses in action and refuses to pay them over under an order of the probate court and is about to remove from the state without leaving means to indemnify may have the executor arrested and restrained from departing from the state until he

executes a bond, with good security, to indemnify his sureties against liability. Ruddell v. Childress, 31 Ark. 511 (1876).

16-107-303. Recovery of money and property from principal debtor.

(a) When any bond, bill, or note for the payment of money or delivery of property shall not be paid by the principal debtor, according to the tenor thereof, and the bond, bill, or note, or any part thereof shall be paid by the security, the principal debtor shall refund to the security the amount or value, with interest thereon at the rate of ten percent (10%) per annum, from the time of payment.

(b)(1) When the payment by a security shall be made in money, the security may recover the money with interest, in an action for so much money, paid to the use of the defendant.

(2) When payment is made in property, he may recover the value, with the interest, in an action for so much property sold to the defendant.

History. Rev. Stat., ch. 137, §§ 4, 5; C. & M. Dig., §§ 8290, 8291; Pope's Dig., §§ 10867, 10868; A.S.A. 1947, §§ 34-336, 34-337.

CASE NOTES

Analysis

Applicability.
Payment by surety.
Priorities of sureties.
Subrogation.
Successive sureties.

Applicability.

This section applies to sureties in the common or technical meaning of the term and not the joint-debtors who make default payment of that part of the debt which they ought to pay. McGee v. Russell, 49 Ark. 104, 4 S.W. 284 (1886).

Volunteers cannot recover under this section. McCabe v. Patterson, 131 Ark. 523, 199 S.W. 548 (1917).

Payment by Surety.

Where a surety pays a debt on default of his principal, there is such an implied assent on the part of the principal as will entitle the surety to maintain an action against him for money paid. Snider v. Greathouse, 16 Ark. 72 (1855); Bone v. Torrey, 16 Ark. 83 (1855); Chipman v. Fambro, 16 Ark. 291 (1855).

A surety need not wait for judgment against him before paying but, by paying before judgment, he undertakes the burden of showing that he was actually bound to pay. Fishback v. Weaver, 34 Ark. 569 (1879).

Surety knowingly paying usurious debt of principal cannot hold him liable. Roe v. Kiser, 62 Ark. 92, 34 S.W. 534 (1896).

Surety on supersedeas bond, after paying the judgment, has no right to summary judgment against his principal. Prairie Creek Coal Mining Co. v. Kittrell, 107 Ark. 361, 155 S.W. 496 (1913).

Surety's complaint against guardian of an estate, seeking to recover the amount of a deficiency paid to the estate, held to be a simple indemnification suit to collect the money that it paid on behalf of a principal obligor and, thus, authorized by this section. Lawyers Sur. Co. v. Cagle, 49 Ark. App. 131, 898 S.W.2d 476 (1995).

Priorities of Sureties.

A surety on a vendee's note for the purchase money has a right to enforce the vendor's lien superior to any other claim against the land on account of the vendee. Beattie v. Dickinson, 39 Ark. 205 (1882).

Surety is entitled to have principal's property first resorted to. Kempner v. Dooley, 60 Ark. 526, 31 S.W. 145 (1895).

Subrogation.

A surety cannot be subrogated until he has paid the entire debt. McConnell v. Beattie, 34 Ark. 113 (1879).

Sureties on guardian's bond who have paid his debts are entitled to subrogation to the ward's remedies against him. Gilbert v. Neely, 35 Ark. 24 (1879).

Successive Sureties.

Where successive sureties are given at various stages of a litigation, each set exonerates the preceding; while all are liable to the creditor, as between themselves, they are liable to exoneration in inverse order. Chrisman v. Jones, 34 Ark. 73 (1879).

In an action against principal and sureties, where property of the principal is attached and he gives cross-bond, with sureties, the latter are primarily liable, as between themselves and the original sureties, to the extent of the value of the property. Fletcher v. Menken, 37 Ark. 206 (1881).

16-107-304. Action against cosurety.

(a) When there are two (2) or more securities in the bond, bill, or note and any of them shall pay in money or property, more than his or her due proportion of the original demand, the security may recover the excess in the same form of action as provided in this subchapter for a security against the principal debtor.

(b) No security shall be compelled in any action, as specified in subsection (a) of this section, to pay more than his or her due proportion of the original demand. When the security shall have previously paid any part thereof, he or she shall be liable in the action to pay only so much as the amount already paid by him or her falls short of his or her due proportion of the original demand.

History. Rev. Stat., ch. 137, §§ 6, 7; C. & M. Dig., §§ 8292, 8293; Pope's Dig., §§ 10869, 10870; A.S.A. 1947, §§ 34-338, 34-339.

CASE NOTES

Analysis

Contribution from heirs.
Mortgage by one surety.

Contribution from Heirs.

Sureties who are compelled to pay the debt after the close of the administration on the estate of a co-surety can subject assets descended to the heir to contribution. Williams v. Ewing & Fanning, 31 Ark. 229 (1876).

Mortgage by One Surety.

The giving of a mortgage by one surety to secure the debt does not render him liable for the whole amount as between himself and his co-sureties, and, if one of them pays the debt, he can only recover contributions from the mortgaging surety. Chollar v. Temple, 39 Ark. 238 (1882). See Boone County Bank v. Byrum, 68 Ark. 71, 56 S.W. 532 (1900).

Cited: Thorsen v. Poe, 123 Ark. 77, 184 S.W. 427 (1916).

16-107-305. Judgment against principal on motion.

(a) In all cases where judgment is given in any circuit court upon any bond, bill, or note for the payment of money or the delivery of property, against the principal debtor and securities therein, and the security shall pay the judgment or any part thereof, he or she shall be entitled, upon motion, to judgment in the same court against the principal debtor for the amount he or she is entitled to recover, together with costs.

(b) No judgment shall be rendered as provided in subsection (a) of this section unless the party applying therefor shall have given the adverse party at least ten (10) days' notice in writing of the motion, nor unless the motion shall be made within one (1) year from the rendition of the original judgment.

History. Rev. Stat., ch. 137, §§ 8, 9; C. & M. Dig., §§ 8294, 8295; Pope's Dig., §§ 10871, 10872; A.S.A. 1947, §§ 34-340, 34-341.

Cross References. Judgment on motion obtained against principal, § 16-65-201.

CASE NOTES

Provisions Cumulative.

This section is cumulative and does not bar an independent action. Washum v. Lester, 183 Ark. 298, 36 S.W.2d 76 (1931).

16-107-306. Action against executors and administrators.

Actions for the remedies given by §§ 21-2-111, 21-2-112, and 16-107-303 — 16-107-306 may be maintained by and against executors and administrators in all cases where they could be maintained by or against their testators or intestates.

History. Rev. Stat., ch. 137, § 18; C. & M. Dig., § 8305; Pope's Dig., § 10882; A.S.A. 1947, § 34-342.

CHAPTER 108

ARBITRATION AND AWARD

SUBCHAPTER.

1. General Provisions.
2. Uniform Arbitration Act.

RESEARCH REFERENCES

ALR. Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 ALR 4th 652.

Corruption, fraud, or undue means in obtaining award justifying avoidance of award. 22 ALR 4th 366.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding. 41 ALR 4th 1013.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 ALR 4th 127.

Am. Jur. 5 Am. Jur. 2d, Arb. & A., § 1 et seq.

Ark. L. Notes. Carnes, Arbitration in Arkansas — At Common Law and Under the 1869 Statute, 1992 Ark. L. Notes 17.

UALR L.J. Flaccus, Anderson, The Family Home and the Bankruptcy Aftermath of Divorce, 1992 Ark. L. Notes 31.

C.J.S. 6 C.J.S., Arbitration, § 1 et seq.

Subchapter 1 — General Provisions

SECTION.
16-108-101. Proceedings.
16-108-102. Submission of controversy.
16-108-103. Oath and powers of arbitrators and umpires.
16-108-104. Submission by fiduciaries.
16-108-105. Refusal of arbitrator to act.
16-108-106. [Repealed.]
16-108-107. Award.

16-108-101. Proceedings.

The proceedings upon arbitration and award made under an order or rule of court, or by consent of parties in vacation, shall be as follows in this subchapter.

History. Civil Code, § 494; C. & M. Dig., § 414; Pope's Dig., § 451; A.S.A. 1947, § 34-501.

CASE NOTES

Analysis

Common law.
Compliance.
Consent of parties.

Common Law.

The provisions of this subchapter do not repeal the common law on the same subject nor are parties thereby prohibited from submitting controversies to arbitration without the intervention of a court. Wilkes v. Cotter, 28 Ark. 519 (1873); Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1944).

Compliance.

An award will not be good as a statutory award unless the proceedings of the arbitrators as to the oath taken by them and other duties have substantially, if not strictly, complied with this subchapter; however, an arbitration and award as at common law are still good and enforceable, notwithstanding this subchapter. Collins v. Karatopsky, 36 Ark. 316 (1880).

A statutory arbitration is abortive where this subchapter is not complied with. Franks v. Battles, 147 Ark. 169, 227 S.W. 32 (1921).

Consent of Parties.

If parties select a private tribunal, they are bound by the result. Kirten v. Spears, 44 Ark. 166 (1884).

The legislature cannot substitute boards of arbitration for the courts without consent of the parties. Saint Louis, I.M. & S. Ry. v. Williams, 49 Ark. 492, 5 S.W. 883 (1887).

The fact that parties agreed to submit a dispute to arbitration implies an agreement to be bound thereby. Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1944).

Cited: Dean Witter Reynolds, Inc. v. Deislinger, 289 Ark. 248, 711 S.W.2d 771 (1986).

16-108-102. Submission of controversy.

(a) All controversies which might be the subject of a suit or action may be submitted to the decision of one (1) or more arbitrators, or to two (2) and their umpire, in the manner provided in this subchapter.

(b) Parties may make submission by rule of any court having jurisdiction of the subject matter or by consent, in vacation. The parties making the submission shall, where there is no suit or action pending, by written agreement filed and noted on the record or by an entry on the record, state what matter is submitted.

(c) The rule of the court shall state the time in which the award is to be made and returned. The court may enlarge the time for making and returning an award.

History. Civil Code, § 494; C. & M. Dig., §§ 415-418; Pope's Dig., §§ 452-455; A.S.A. 1947, § 34-502.

CASE NOTES

Analysis

Agreement for arbitration.
Barred causes.
Withdrawal.

Agreement for Arbitration.

Agreement for arbitration need not be in writing; submission might be inferred from conduct of the parties. Couch v. Harrison, 68 Ark. 580, 60 S.W. 957 (1901).

An agreement that the parties to a dispute would submit the testimony of certain witnesses to the court and let the court say whether the defendant was guilty and assess his punishment, whereupon the court should appoint three disinterested men, counsel them, and let them hear the testimony, and the parties were to abide by their decision, was a contract for statutory arbitration. Franks v. Battles, 147 Ark. 169, 227 S.W. 32 (1921).

Barred Causes.

Although defendant is barred by statute of limitations from recouping damages, cause may be suspended to enable parties to arbitrate. Soudan Planting Co. v. Stevenson, 94 Ark. 599, 128 S.W. 574 (1910).

Withdrawal.

After submission, arbitration cannot be defeated by withdrawal of one of the arbitrators. Niagara Fire Ins. Co. v. Boon, 76 Ark. 153, 88 S.W. 915 (1905).

Parties may withdraw from a common law arbitration agreement at any time before the award when the agreement to arbitrate is founded only on the mutual agreement of the parties and not on a special consideration. Insurance Co. of N. Am. v. Kemper, 132 Ark. 215, 200 S.W. 986 (1918). Compare Ferguson v. Rogers, 129 Ark. 197, 195 S.W. 22 (1917).

16-108-103. Oath and powers of arbitrators and umpires.

(a)(1) Arbitrators and the umpire, if there is one, before they proceed to act, shall take an oath to decide the controversy submitted to them according to law and evidence and the equity of the case, to the best of their judgment, without favor or affection.

(2) A certificate of the oath shall be returned to the court with the award.

(b) They shall have power to examine either party, on oath, at the request of his or her adversary.

(c)(1) Any one (1) of the arbitrators shall have power to issue subpoenas for witnesses to attend their sitting and give evidence touching the matters referred to them, to which all sheriffs and other like officers shall give obedience.

(2) Witnesses failing to attend before arbitrators at the time and place designated or who refuse to give evidence when they do attend shall be reported to the court by the arbitrators and proceeded against and punished as if the case had been pending in court.

History. Civil Code, § 494; C. & M. Dig., §§ 419-421; Pope's Dig., §§ 456-458; A.S.A. 1947, §§ 34-503, 34-504.

CASE NOTES

Appellate Review.

The circuit court erred by awarding pre- and post-judgment interest where the arbitrator denied appellee's request for interest; this section provides that, unless the award is modified, the court shall confirm the award as made. 200 Garrison Assocs. v. Crawford Constr. Co., 53 Ark. App. 7, 918 S.W.2d 195 (1996).

Even though arbitrator's award may be modified or corrected if there is evident miscalculation of figures in the award, an arbitrator's decision on all questions of law and fact is conclusive and should be affirmed by the court unless grounds are established to support vacating or modifying the award. 200 Garrison Assocs. v. Crawford Constr. Co., 53 Ark. App. 7, 918 S.W.2d 195 (1996).

16-108-104. Submission by fiduciaries.

(a) The personal representatives of a decedent, guardian of an infant, guardian of an idiot or lunatic, or any trustee may make a submission as provided for in this subchapter touching the estate of the decedent, infant, insane person, or person in respect to which he or she is trustee.

(b) Any submission so made in good faith, and the award made thereon, shall be binding and shall be entered as the judgment or decree of the court.

(c) No fiduciary shall be responsible for any loss sustained by an award adverse to the interest he or she represents unless the adverse award is caused by his or her fault or neglect.

History. Civil Code, § 494; C. & M. Dig., § 422; Pope's Dig., § 459; A.S.A. 1947, § 34-505.

16-108-105. Refusal of arbitrator to act.

If any arbitrator fails or refuses to act, the court may set aside the order of reference.

History. Civil Code, § 494; C. & M. Dig., § 423; Pope's Dig., § 460; A.S.A. 1947, § 34-506.

16-108-106. [Repealed.]

Publisher's Notes. This section, concerning proceedings before justice's court and appeals, was repealed by Acts 2003, No. 1185, § 223. The section was derived from Civil Code, § 494; C. & M. Dig., §§ 427, 428; Pope's Dig., §§ 464, 465; A.S.A. 1947, § 34-510.

16-108-107. Award.

(a)(1) The arbitrators and umpire, if there is one, shall meet at such convenient times and places as may be necessary, of which the parties shall have reasonable notice. They shall hear such evidence as either party may adduce.

(2) They shall have power to administer oaths.

(3) They shall make their award in writing, stating therein the time when it is made, and shall sign it.

(4) When the award is made out, one (1) copy shall be delivered to each of the contending parties. The original shall be returned to the court, and on it the arbitrators shall note the time of delivering a copy to each party.

(b) If the award is made out and returned, and copies delivered ten (10) days before the term of court next succeeding the delivery, the award shall be entered of record and made the judgment or decree of the court unless, on exceptions filed, the award shall be set aside.

(c) No award shall be set aside for the want of form. However, courts shall have power over awards on equitable principles as heretofore.

History. Civil Code, § 494; C. & M. Dig., §§ 424-426; Pope's Dig., §§ 461-463; A.S.A. 1947, §§ 34-507 — 34-509.

CASE NOTES

Analysis

In general.
Conclusiveness of awards.
Notice.
Setting aside of awards.
Suits based on awards.

In General.

As at common law, an arbitration which appears regular and unimpeached by facts or denials is of the very highest authority. Harris v. Hanie, 37 Ark. 348 (1881).

Every reasonable presumption is in favor of the award. Niagara Fire Ins. Co. v. Boon, 76 Ark. 153, 88 S.W. 915 (1905).

Conclusiveness of Awards.

Parties to an arbitration are concluded by award. Harris v. Hanie, 37 Ark. 348 (1881); Blanton v. Littell, 65 Ark. 76, 44 S.W. 716 (1898).

If parties select a private tribunal, they are bound by the result. Kirten v. Spears, 44 Ark. 166 (1884).

Arbitrators have full power to decide upon questions of law and fact which directly or incidentally arise in considering and determining the question embraced in the submission, and their decision upon such matters is conclusive. Kirten v. Spears, 44 Ark. 166 (1884).

The fact that parties agreed to submit a dispute to arbitration implies an agreement to be bound thereby. Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1944).

Notice.

The award is not binding upon a party who was without notice. McFarland v. Mathis, 10 Ark. 560 (1850).

If a party has notice, he is bound by the award even though not present at the meeting. Couch v. Harrison, 68 Ark. 580, 60 S.W. 957 (1901).

Setting Aside of Awards.

Unless the illegality of the decision of arbitrators appears upon the face of their award, the court will not set it aside on the ground merely that they mistook the law or decided contrary to the rules of established practice of courts of law or equity. Kirten v. Spears, 44 Ark. 166 (1884).

Every reasonable intendment and presumption is in favor of award; it should

not be vacated unless it clearly appears that it was made without authority or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers. Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1944).

Testimony of an arbitrator tending to impeach the award was held incompetent and should have been disregarded. Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1944).

Suits Based on Awards.

Award of arbitration is condition precedent to bringing an action. Soudan Planting Co. v. Stevenson, 94 Ark. 599, 128 S.W. 574 (1910).

In suit based on an arbitration award valid and binding on the parties, there is nothing to submit to the jury and verdict should be directed. Alexander v. Fletcher, 206 Ark. 906, 175 S.W.2d 196 (1944).

Subchapter 2 — Uniform Arbitration Act

SECTION.
16-108-201. Agreement to arbitrate — Application.
16-108-202. Proceedings to compel or stay arbitration.
16-108-203. Appointment of arbitrators by court.
16-108-204. Majority action by arbitrators.
16-108-205. Hearing.
16-108-206. Representation by attorney.
16-108-207. Witnesses — Subpoenas — Depositions — Fees.
16-108-208. Award.
16-108-209. Change of award by arbitrators.
16-108-210. Fees and expenses of arbitration.
16-108-211. Confirmation of an award.
16-108-212. Vacating an award.
16-108-213. Modification or correction of award.
16-108-214. Judgment or decree on award.
16-108-215. Judgment roll — Docketing.
16-108-216. Applications to court.
16-108-217. Court — Jurisdiction.
16-108-218. Venue.
16-108-219. Appeals.
16-108-220. Subchapter not retroactive.
16-108-221. Uniformity of interpretation.
16-108-222. Constitutionality.
16-108-223. Short title.
16-108-224. Repeal.

Effective Dates. Acts 1981, No. 616, § 3: Mar. 23, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that doubt and confusion exist as to the applicability of the Uniform Arbitration Act to certain disputes; that it is imperative that such doubt and confusion be resolved at once; and that said doubt and confusion can be resolved only through enactment of this bill. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in force from the date of its approval."

Publisher's Notes. For Comments regarding the Uniform Arbitration Act, see Commentaries Volume B.

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, How Much Do You Know (or Care) About Alternative Disputer Resolution?, 1996 Ark. L. Notes 53.

CASE NOTES

In General.

This state has a strong public policy favoring arbitration. May Constr. Co. v. Benton Sch. Dist. No. 8, 320 Ark. 147, 895 S.W.2d 521 (1995).

16-108-201. Agreement to arbitrate — Application.

(a) A written agreement to submit any existing controversy to arbitration arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

(b)(1) A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

(2) This subsection shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.

History. Acts 1969, No. 260, § 1; 1981, No. 616, § 1; A.S.A. 1947, § 34-511; Acts 1993, No. 287, § 1; 2003, No. 1185, § 224.

Amendments. The 2003 amendment deleted "at law or in equity" preceding "for the revocation of any contract" throughout.

RESEARCH REFERENCES

ALR. Enforcement of arbitration agreement contained in construction contract by or against nonsignatory. 100 ALR 5th 481.

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

UALR L.J. Legislative Survey, Attorneys, 16 UALR L.J. 61.

CASE NOTES

Analysis

Applicability.
Mutuality of obligation.
Parties.
Punitive damages.
Subcontracts.
Surety bonds.

Applicability.

Since this subchapter, until amended in 1981, validated only arbitration agreements with respect to construction and manufacturing contracts, an arbitration contract regarding the purchase of an agricultural commodity that was expected to grow during the 1980 crop season was unenforceable under this subchapter. McEntire v. Monarch Feed Mills, Inc., 276 Ark. 1, 631 S.W.2d 307 (1982).

Personal injury or tort matters cannot be the subject of arbitration. Chem-Ash, Inc. v. Arkansas Power & Light Co., 296 Ark. 83, 751 S.W.2d 353 (1988).

Where two offer-and-acceptance real estate contracts were at issue, one executed after the termination of employment, this subchapter applied to commission dispute between former employer-employee real estate brokers. Lancaster v. West, 319 Ark. 293, 891 S.W.2d 357 (1995).

Trial court erred in declaring a matter nonarbitrable under the Arkansas Uniform Arbitration Act merely because the manner in which a party chose to characterize its action initially appeared to render the matter as falling outside the AUAA although the construction company characterized its claims in tort, it was actually a breach of contract action and the company's claims were arbitrable. Lehman Props., L.P. v. BB&B Constr. Co., 81 Ark. App. 104, 98 S.W.3d 470 (2003).

Mutuality of Obligation.

Language in a contract between a check cashing service and its customers which required the customers to arbitrate all claims was unenforceable as there was no mutuality of obligation; customers were required to submit all disputes and controversies of every kind and nature to arbitration, but the check cashing service was permitted to proceed immediately to court to collect amounts due it. Showmethemoney Check Cashers, Inc. v.

Williams, 342 Ark. 112, 27 S.W.3d 361 (2000).

Mutuality of contact had to exist in an arbitration agreement between a check cashing company and consumers in order for the agreement to be valid; the company could not exercise any one of the remedies listed in the default portion of the agreement while the consumers were bound to arbitration because the agreement lacked mutuality and could not stand. Cash in a Flash Check Advance of Ark., L.L.C. v. Spencer, 348 Ark. 459, 74 S.W.3d 600 (2002).

This section, which purports to prevent the enforceability of arbitration clauses in insurance contracts, "directly or indirectly affects or governs" crop insurance contracts authorized by the Federal Crop Insurance Corporation; therefore, it is inconsistent with, and preempted by, the Federal Crop Insurance Act, 7 U.S.C.S. § 1501 et seq., which mandates arbitration. IGF Ins. Co. v. Hat Creek P'ship, 349 Ark. 133, 76 S.W.3d 859 (2002).

Parties.

An arbitration clause contained in the prime contract was not binding upon a party that merely served as a supplier of structural steel to subcontractors since the party had not contracted to perform any work outside of delivery. Baldwin Co. v. Weyland Mach. Shop, Inc., 14 Ark. App. 118, 685 S.W.2d 537 (1985).

Punitive Damages.

Arbitration panel was without power to rule upon any action by the parties which would have supported an award of punitive damages. McLeroy v. Waller, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

Subcontracts.

Where contract proposal submitted by subcontractor on project for construction of a fire station provided for arbitration of any controversy or claim under the rules of the American Arbitration Association, and where the subcontract was accepted by the general contractor in Arkansas and performed in Arkansas, the subcontract would not be construed as an agreement finally consummated at any place other than Arkansas. Prepakt Concrete Co. v. Whitehurst Bros., 261 Ark. 814, 552 S.W.2d 212 (1977).

Surety Bonds.

A surety bond is not an "insurance policy" as contemplated by this subchapter or subsection (b) of this section and, therefore, party was bound by the arbitration provision incorporated by reference in the performance bond. Matson, Inc. v. Lamb & Assocs. Packaging, 328 Ark. 705, 947 S.W.2d 324 (1997).

Cited: Jim Halsey Co. v. Bonar, 284 Ark. 461, 683 S.W.2d 898 (1985); Hardy Constr. Co. v. Arkansas State Hwy. & Transp. Dep't, 324 Ark. 496, 922 S.W.2d 705 (1996); E-Z Cash Advance, Inc. v. Harris, 347 Ark. 132, 60 S.W.3d 436 (2001).

16-108-202. Proceedings to compel or stay arbitration.

(a) On application of a party showing an agreement described in § 16-108-201 and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the

application shall be made therein. Otherwise, and subject to § 16-108-218, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section, or, if the issue is severable, the stay may be with respect thereto only. When the application is made in the action or proceeding, the order for arbitration shall include the stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

History. Acts 1969, No. 260, § 2; A.S.A. 1947, § 34-512.

RESEARCH REFERENCES

ALR. Enforcement of arbitration agreement contained in construction contract by or against nonsignatory. 100 ALR 5th 481.

CASE NOTES

Cited: May Constr. Co. v. Thompson, 341 Ark. 879, 20 S.W.3d 345 (2000), appeal dismissed sub nom. May Constr. Co. v. Riverdale Dev. Co., LLC, 345 Ark. 239, 45 S.W.3d 815 (2001); E-Z Cash Advance, Inc. v. Harris, 347 Ark. 132, 60 S.W.3d 436 (2001).

16-108-203. Appointment of arbitrators by court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

History. Acts 1969, No. 260, § 3; A.S.A. 1947, § 34-513.

CASE NOTES

Cited: Hardy Constr. Co. v. Arkansas State Hwy. & Transp. Dep't, 324 Ark. 496, 922 S.W.2d 705 (1996).

16-108-204. Majority action by arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this subchapter.

History. Acts 1969, No. 260, § 4; A.S.A. 1947, § 34-514.

16-108-205. Hearing.

Unless otherwise provided by the agreement:

(1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five (5) days before the hearing. Appearance at the hearing waives notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy;

(2) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing;

(3) The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

History. Acts 1969, No. 260, § 5; A.S.A. 1947, § 34-515.

CASE NOTES

Notice.

The party attempting to overturn an arbitration award — not party attempting to sustain it — bears the burden of proof of showing insufficient notice. Lancaster v. West, 319 Ark. 293, 891 S.W.2d 357 (1995).

Cited: May Constr. Co. v. Thompson, 341 Ark. 879, 20 S.W.3d 345 (2000), appeal dismissed sub nom. May Constr. Co. v. Riverdale Dev. Co., LLC, 345 Ark. 239, 45 S.W.3d 815 (2001).

16-108-206. Representation by attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under this subchapter. A waiver thereof prior to the proceeding or hearing is ineffective.

History. Acts 1969, No. 260, § 6; A.S.A. 1947, § 34-516.

16-108-207. Witnesses — Subpoenas — Depositions — Fees.

(a) The arbitrators may issue or cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the

court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the circuit court.

History. Acts 1969, No. 260, § 7; A.S.A. 1947, § 34-517.

CASE NOTES

Cited: May Constr. Co. v. Thompson, 341 Ark. 879, 20 S.W.3d 345 (2000), appeal dismissed sub nom. May Constr. Co. v. Riverdale Dev. Co., LLC, 345 Ark. 239, 45 S.W.3d 815 (2001).

16-108-208. Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he or she notifies the arbitrators of his or her objection prior to the delivery of the award to him or her.

History. Acts 1969, No. 260, § 8; A.S.A. 1947, § 34-518.

CASE NOTES

Written Findings.

This section does not require that the arbitrators make specific written findings on each issue raised during arbitration. Hart v. McChristian, 344 Ark. 656, 42 S.W.3d 552 (2001).

16-108-209. Change of award by arbitrators.

On application of a party or, if an application to the court is pending under §§ 16-108-211 — 16-108-213, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in § 16-108-213(a)(1) and (3) or for the purpose of clarifying the award. The application shall be made within twenty (20) days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that he or she must serve his objections

thereto, if any, within ten (10) days from the notice. The award so modified or corrected is subject to the provisions of §§ 16-108-211 — 16-108-213.

History. Acts 1969, No. 260, § 9; A.S.A. 1947, § 34-519.

CASE NOTES

Cited: Davis v. Little Rock Sch. Dist., — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 557 (Aug. 31, 2005).

16-108-210. Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses incurred in the conduct of the arbitration, not including counsel fees, shall be paid as provided in the award.

History. Acts 1969, No. 260, § 10; A.S.A. 1947, § 34-520.

16-108-211. Confirmation of an award.

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating, modifying, or correcting the award, in which case the court shall proceed as provided in §§ 16-108-212 and 16-108-213.

History. Acts 1969, No. 260, § 11; A.S.A. 1947, § 34-521.

CASE NOTES

Analysis

Judicial review.
Vacating, modifying, or correcting awards.

Judicial Review.

Judicial review of an arbitration award is more limited than appellate review of a trial court's decision; whenever possible, a court must construe an award so as to uphold its validity. Chrobak v. Edward D. Jones & Co., 46 Ark. App. 105, 878 S.W.2d 760 (1994).

Vacating, Modifying, or Correcting Awards.

The decision of the arbitration board on all questions of law and fact is conclusive, and the award shall be confirmed unless grounds are established to support vacating or modifying the award. McLeroy v. Waller, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

This section and § 16-108-212 combine to provide that the grounds for vacating or modifying an arbitration award may include both the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown and the refusal to hear evidence material to the controversy so as to substantially prejudice the rights of a party. McLeroy v. Waller, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

16-108-212. Vacating an award.

(a) Upon application of a party, the court shall vacate an award in which:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 16-108-205, as to prejudice substantially the rights of a party; or

(5)(A) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 16-108-202 and the party did not participate in the arbitration hearing without raising the objection;

(B) But the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud, or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than those stated in subdivision (a)(5) of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with § 16-108-203, or, if the award is vacated on grounds set forth in subdivisions (a)(3) and (4) of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 16-108-203. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

History. Acts 1969, No. 260, § 12; A.S.A. 1947, § 34-522; Acts 2003, No. 1185, § 225.

Amendments. The 2003 amendment redesignated former (a)(5) as present (a)(5)(A) and (a)(5)(B); deleted "of law or equity" following "court" in (a)(5)(B).

RESEARCH REFERENCES

Ark. L. Notes. Carnes, Arbitration in Arkansas — At Common Law and Under the 1869 Statute, 1992 Ark. L. Notes 17.

Flaccus, Anderson, The Family Home and the Bankruptcy Aftermath of Divorce, 1992 Ark. L. Notes 31.

CASE NOTES

Analysis

In general.
Burden of proof.
Grounds.
Limitation of actions.

In General.

The fact that parties agree to submit their disputes to arbitration implies an agreement to be bound by the arbitration board's decision, thus, every reasonable intendment and presumption is in favor of the award and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance; unless the illegality of the decision appears on the face of the award, courts will not interfere merely because the arbitrators have mistaken the law or decided contrary to the rules of established practice as observed by courts of law and equity. McLeroy v. Waller, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

Judicial review of an arbitration award is more limited than appellate review of a trial court's decision; whenever possible, a court must construe an award so as to uphold its validity. Chrobak v. Edward D. Jones & Co., 46 Ark. App. 105, 878 S.W.2d 760 (1994).

On a motion to vacate an arbitration award, an arbitrator's procedural decisions are entitled to deference. Hart v. McChristian, 71 Ark. App. 178, 36 S.W.3d 357 (2000).

Trial court correctly ruled that a terminated school principal's suit against a school district was barred by res judicata as the principal had a full and fair opportunity in the arbitration proceeding to litigate the matters raised in the instant suit; further, the arbitrator denied reconsideration and the principal neither appealed from that ruling nor asked the circuit court to vacate or modify award. Davis v. Little Rock Sch. Dist., — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 557 (Aug. 31, 2005).

Burden of Proof.

The interest, partiality, or bias which will overturn an arbitration award must be certain and direct, not remote, uncertain, or speculative; the party attempting to set aside the award bears the burden of proof to establish partiality. Dean Witter Reynolds, Inc. v. Deislinger, 289 Ark. 248, 711 S.W.2d 771 (1986); Lancaster v. West, 319 Ark. 293, 891 S.W.2d 357 (1995).

Grounds.

Neither the failure to keep a record of the arbitration proceedings nor the failure to follow the rules of evidence is enumerated in this section as being a ground for setting aside an arbitration award. Dean Witter Reynolds, Inc. v. Deislinger, 289 Ark. 248, 711 S.W.2d 771 (1986).

Even though URE 406 may have permitted some of the evidence that was excluded at the arbitration hearing to have been considered by a court of law or equity, the exclusion of the evidence in the arbitration proceeding was not a statutory ground for vacating the arbitration award. Dean Witter Reynolds, Inc. v. Deislinger, 289 Ark. 248, 711 S.W.2d 771 (1986).

The decision of the arbitration board on all questions of law and fact is conclusive, and the award shall be confirmed unless grounds are established to support vacating the award; this section and § 16-108-211 combine to provide that the grounds for vacating or modifying an arbitration award may include both the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown and the refusal to hear evidence material to the controversy so as to substantially prejudice the rights of a party. McLeroy v. Waller, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

"Undue means" means something akin to fraud and corruption; a mistake does not amount to undue means. Arkansas Dep't of Parks & Tourism v. Resort Managers, Inc., 294 Ark. 255, 743 S.W.2d 389 (1988).

Mistakes of fact or law are not a basis to set aside an award. Arkansas Dep't of Parks & Tourism v. Resort Managers, Inc., 294 Ark. 255, 743 S.W.2d 389 (1988).

The trial judge properly declined to vacate an arbitration award where the appellant failed to raise a substantive issue sufficient to avoid the arbitration procedure and the finality of the award. Chrobak v. Edward D. Jones & Co., 46 Ark. App. 105, 878 S.W.2d 760 (1994).

Limitation of Actions.

The proper state statute of limitations to be applied in determining the timeliness of actions brought by a union employee against an employer for breach of a collective bargaining agreement and against a union for breach of the duty of fair representation was subsection (b), governing the vacating of arbitration awards. Hunt v. Missouri P.R.R., 561 F. Supp. 310 (E.D. Ark. 1983), aff'd, 729 F.2d 578 (8th Cir. 1984).

Party to an arbitration proceeding cannot wait until award is made and then complain about something that could have been questioned or discovered during the process. Arkansas Dep't of Parks & Tourism v. Resort Managers, Inc., 294 Ark. 255, 743 S.W.2d 389 (1988).

Cited: Wessell Bros. Found. Drilling Co. v. Crossett Pub. School Dist. No. 52, 287 Ark. 415, 701 S.W.2d 99 (1985); Anthony v. Kaplan, 324 Ark. 52, 918 S.W.2d 174 (1996); Hart v. McChristian, 344 Ark. 656, 42 S.W.3d 552 (2001).

16-108-213. Modification or correction of award.

(a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

History. Acts 1969, No. 260, § 13; A.S.A. 1947, § 34-523.

RESEARCH REFERENCES

Ark. L. Notes. Carnes, Arbitration in Arkansas — At Common Law and Under the 1869 Statute, 1992 Ark. L. Notes 17.

Flaccus, Anderson, The Family Home and the Bankruptcy Aftermath of Divorce, 1992 Ark. L. Notes 31.

CASE NOTES

Grounds.

The decision of the arbitration board on all questions of law and fact is conclusive, and the award shall be confirmed unless grounds are established to support modifying the award. McLeroy v. Waller, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

Cited: Wessell Bros. Found. Drilling Co. v. Crossett Pub. School Dist. No. 52, 287 Ark. 415, 701 S.W.2d 99 (1985); Hart v. McChristian, 344 Ark. 656, 42 S.W.3d 552 (2001); Davis v. Little Rock Sch. Dist., — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 557 (Aug. 31, 2005).

16-108-214. Judgment or decree on award.

Upon the granting of an order confirming, modifying, or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements, may be awarded by the court.

History. Acts 1969, No. 260, § 14; A.S.A. 1947, § 34-524.

16-108-215. Judgment roll — Docketing.

(a) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying, or correcting the award; and

(4) A copy of the judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

History. Acts 1969, No. 260, § 15; A.S.A. 1947, § 34-525.

16-108-216. Applications to court.

Except as otherwise provided, an application to the court under this subchapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

History. Acts 1969, No. 260, § 16; A.S.A. 1947, § 34-526.

CASE NOTES

Cited: Lancaster v. West, 319 Ark. 293, 891 S.W.2d 357 (1995).

16-108-217. Court — Jurisdiction.

The term "court" means any circuit court of this state. The making of an agreement described in § 16-108-201 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this subchapter and to enter judgment on an award thereunder.

History. Acts 1969, No. 260, § 17; A.S.A. 1947, § 34-527; Acts 2003, No. 1185, § 226.

Amendments. The 2003 amendment deleted "or chancery" preceding "court."

CASE NOTES

Analysis

Chancery court.
Discovery.

Chancery Court.

Chancery court had subject-matter jurisdiction in suit between construction company and state highway department where the relief requested was akin to a mandatory injunction to enforce the contract or, alternatively, to enforce specific performance of the contract provision relating to court appointment of an arbitrator. Hardy Constr. Co. v. Arkansas State Hwy. & Transp. Dep't, 324 Ark. 496, 922 S.W.2d 705 (1996).

Discovery.

A circuit court did not exceed its jurisdiction by issuing orders to enforce an arbitrator's discovery orders. May Constr. Co. v. Thompson, 341 Ark. 879, 20 S.W.3d 345 (2000), appeal dismissed sub nom. May Constr. Co. v. Riverdale Dev. Co., LLC, 345 Ark. 239, 45 S.W.3d 815 (2001).

A circuit court did not abuse its discretion in ordering a party to comply with discovery requests in a civil action which was simultaneously pending in arbitration. May Constr. Co. v. Thompson, 341 Ark. 879, 20 S.W.3d 345 (2000), appeal dismissed sub nom. May Constr. Co. v. Riverdale Dev. Co., LLC, 345 Ark. 239, 45 S.W.3d 815 (2001).

16-108-218. Venue.

An initial application shall be made to the circuit court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application shall be made in the county where the adverse party resides or has a place of business or, if he or she has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

History. Acts 1969, No. 260, § 18; A.S.A. 1947, § 34-528; Acts 2003, No. 1185, § 226.

Amendments. The 2003 amendment deleted "or chancery" preceding "court."

16-108-219. Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under § 16-108-202;

(2) An order granting an application to stay arbitration made under § 16-108-202(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this subchapter.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

History. Acts 1969, No. 260, § 19; A.S.A. 1947, § 34-529.

CASE NOTES

Analysis

Appealable orders.
Nonappealable orders.

Appealable Orders.

Order refusing to vacate an arbitration award was tantamount to an order confirming an arbitration award and was therefore appealable under subdivision (a)(3) of this section. ESI Group, Inc. v. Brown, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 143 (Feb. 16, 2005).

Nonappealable Orders.

An order compelling arbitration is not appealable. Chem-Ash, Inc. v. Arkansas Power & Light Co., 296 Ark. 83, 751 S.W.2d 353 (1988).

16-108-220. Subchapter not retroactive.

This subchapter applies only to agreements made subsequent to its taking effect.

History. Acts 1969, No. 260, § 20; A.S.A. 1947, § 34-530.

16-108-221. Uniformity of interpretation.

This subchapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History. Acts 1969, No. 260, § 21; A.S.A. 1947, § 34-531.

16-108-222. Constitutionality.

If any provision of this subchapter, or the application thereof to any person or circumstance, is held invalid, the invalidity shall not affect other provisions or applications of the subchapter which can be given without the invalid provision or application, and to this end the provisions of this subchapter are severable.

History. Acts 1969, No. 260, § 22.

16-108-223. Short title.

This subchapter may be cited as the "Uniform Arbitration Act."

History. Acts 1969, No. 260, § 23; A.S.A. 1947, § 34-532.

16-108-224. Repeal.

All acts or parts of acts which are inconsistent with the provisions of this subchapter are hereby repealed.

History. Acts 1969, No. 260, § 24.

CHAPTER 109

ARREST OF CIVIL DEFENDANT

SECTION.

16-109-101 — 16-109-116. [Repealed.]

16-109-101 — 16-109-116. [Repealed.]

Publisher's Notes. This chapter was repealed by Acts 2003, No. 1185, § 227. The chapter was derived from the following sources:

16-109-101. Civil Code, § 173; C. & M. Dig., § 438; Pope's Dig., § 475; A.S.A. 1947, § 34-601.

16-109-102. Civil Code, § 174; Acts 1871, No. 48, § 1 [174], p. 219; C. & M. Dig., § 439; Pope's Dig., § 476; A.S.A. 1947, § 34-602.

16-109-103. Civil Code, §§ 175-179, 778; C. & M. Dig., §§ 440-444, 9167; Pope's Dig., § 477-481, 11829; A.S.A. 1947, §§ 34-603 — 34-608.

16-109-104. Civil Code, §§ 180-183; C. & M. Dig., §§ 445-448; Pope's Dig., §§ 482-485; A.S.A. 1947, §§ 34-609 — 34-612.

16-109-105. Civil Code, §§ 184-188; C. & M. Dig., §§ 449-453; Pope's Dig., §§ 486-490; A.S.A. 1947, §§ 34-613 — 34-617.

16-109-106. Civil Code, § 189; C. & M. Dig., § 454; Pope's Dig., § 491; A.S.A. 1947, § 34-618.

16-109-107. Civil Code, §§ 192-194; C. & M. Dig., §§ 465-467; Pope's Dig., §§ 502-504; A.S.A. 1947, §§ 34-629 — 34-631.

16-109-108. Rev. Stat., ch. 79, § 5; C. & M. Dig., § 458; Pope's Dig., § 495; A.S.A. 1947, § 34-622.

16-109-109. Rev. Stat., ch. 79, § 7; C. & M. Dig., § 459; Pope's Dig., § 496; A.S.A. 1947, § 34-623.

16-109-110. Rev. Stat., ch. 79, §§ 8-10; C. & M. Dig., §§ 460-462; Pope's Dig., §§ 497-499; A.S.A. 1947, §§ 34-624 — 34-626.

16-109-111. Civil Code, §§ 190, 191; C. & M. Dig., §§ 463, 464; Pope's Dig., §§ 500, 501; A.S.A. 1947, §§ 34-627, 34-628.

16-109-112. Civil Code, §§ 192-194; C. & M. Dig., §§ 465-467; Pope's Dig., §§ 502-504; A.S.A. 1947, §§ 34-629 — 34-631.

16-109-113. Civil Code, §§ 195, 196; C. & M. Dig., §§ 468, 469; Pope's Dig., §§ 505, 506; A.S.A. 1947, §§ 34-632, 34-633.

16-109-114. Civil Code, § 197; C. & M. Dig., § 470; Pope's Dig., § 507; A.S.A. 1947, § 34-634.

16-109-115. Civil Code, §§ 198-200; Acts 1871, No. 48, § 1 [198, 199], p. 219; C. & M. Dig., §§ 471-473; Pope's Dig., §§ 508-510; A.S.A. 1947, §§ 34-635 — 34-637.

16-109-116. Civil Code, § 201; C. & M. Dig., § 474; Pope's Dig., § 511; A.S.A. 1947, § 34-638.

CHAPTER 110

ATTACHMENT AND GARNISHMENT

SUBCHAPTER.

1. General Provisions.
2. Attachment Against Specific Property.
3. Attachment of Boats and Vessels.
4. Garnishment Proceedings.

RESEARCH REFERENCES

ALR. Special bank deposits as subject of attachment or garnishment to satisfy depositor's general obligations. 8 ALR 4th 998.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt. 36 ALR 4th 824.

Liquor license as subject to execution or attachment. 40 ALR 4th 927.

Am. Jur. 6 Am Jur. 2d, Attach., § 1 et seq.

Ark. L. Notes. Laurence, Recent Developments in the Arkansas Law of Garnishment: A Compendium of the Pertinent Cases and Statutes, 1992 Ark. L. Notes 39.

Laurence, Recent Developments in the Arkansas Law of Garnishment: Does a Corporate Garnishee Need a Lawyer to Answer the Writ?, 1997 Ark. L. Notes 95.

Ark. L. Rev. Garnishment Before Judgment in Arkansas, 8 Ark. L. Rev. 141.

Attachment in Arkansas, 13 Ark. L. Rev. 116.

Conflict of Laws — Constitutional Law — Quasi In Rem Jurisdiction Based on Attachment of Out-of-State Defendant's Liability Insurance Policy, 23 Ark. L. Rev. 651.

Constitutional Law — Prejudgment Garnishment of Wages, 23 Ark. L. Rev. 660.

Creditor's Rights — Attachment Revised, 26 Ark. L. Rev. 225.

Creditor's Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

Laurence, Enforcing a Money Judgment Against the Defendant's Stocks and Bonds: A Brief Foray into the Forbidding Realms of Article Eight and the Fourth Amendment, 38 Ark. L. Rev. 561.

Notes, Illuminating a Gray Area: Prejudgment Attachment in Arkansas After Springdale Farms, Inc. v. McIlroy Bank & Trust, 38 Ark. L. Rev. 881.

Note, McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988), 42 Ark. L. Rev. 1122.

C.J.S. 7 C.J.S., Attachment, § 1 et seq. 38 C.J.S., Garnishment, § 1 et seq.

UALR L.J. Arkansas Law Survey, Looney, Business Law, 8 UALR L.J. 99.

Survey — Constitutional Law, 12 UALR L.J. 161.

Note, Constitutional Law — Writ of Execution Statutes Held Unconstitutional — Has the Due Process Notice Requirement Left Creditors Out in the Cold? Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990), 13 UALR L.J. 293.

Subchapter 1 — General Provisions

SECTION.
16-110-101. Grounds generally for attachment.
16-110-102. Garnishment generally.
16-110-103. Attachment in tort actions.
16-110-104. Attachment before debt due.
16-110-105. Venue.
16-110-106. Order of attachment.
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16-110-121. Collection, preservation, and sale of property.
16-110-122. Bond for restitution of property.
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16-110-128. Time for disposition of attachment.
16-110-129. Discharge of garnishee.
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16-110-135. Repossession of property by sheriff.
16-110-136. Sale of property.
16-110-137. Judgment on bond.
16-110-138. [Superseded.]
16-110-139. Powers of court.

Cross References. Bonds not void for want of form, § 16-68-204.

Claiming constitutional exemptions, § 16-66-211.

Exemptions from attachment, § 16-66-201 et seq.

Effective Dates. Acts 1861, No. 146, § 3: effective on passage.

Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875, No. 6, § 2: effective on passage.

Acts 1881, No. 53, § 2: effective on passage.

Acts 1915, No. 290, § 24: June 1, 1915.

CASE NOTES

Equity.

This subchapter authorizes proceedings by attachment in equity. American Land Co. v. Grady, 33 Ark. 550 (1878).

16-110-101. Grounds generally for attachment.

The plaintiff in a civil action, at or after its commencement, may have an attachment against the property of the defendant, in the cases and upon the grounds stated in this section, as a security for the satisfaction of such judgment as may be recovered:

(1)(A) In an action for the recovery of money, where the action is against a defendant who, or several defendants who, or one of whom:

(i) Is a foreign corporation, or nonresident of the state. However, an attachment shall not be granted on the ground that the defendant or defendants, or any of them, is a foreign corporation or nonresident of this state, for any claim other than a debt or demand arising upon contract; or,

(ii) Has been absent therefrom four (4) months; or,

(iii) Has departed from this state, with intent to defraud his or her creditors; or,

(iv) Has left the county of his or her residence to avoid the service of a summons; or,

(v) So conceals himself or herself that a summons cannot be served upon him or her; or,

(vi) Is about to remove, or has removed, his or her property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim, or the claim of the defendant's creditors; or,

(vii) Has sold, conveyed, or otherwise disposed of his or her property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his or her creditors; or,

(viii) Is about to sell, convey, or otherwise dispose of his or her property, with such intent.

(B) The cause of attachment mentioned in subdivision (1)(A) of this section against one (1) or more defendants to a civil action shall not authorize an attachment against any of the defendants who are not embraced in (1)(A) of this section; but the estate or interest of the defendants, only as are embraced therein, shall be subject to attachment.

(2) In an action to recover possession of personal property, where it has been ordered to be delivered to the plaintiff and where the property, or part thereof, has been disposed of, concealed, or removed, so that the order for its delivery cannot be executed by the officer.

History. Civil Code, § 216; C. & M. Dig., § 494; Pope's Dig., § 531; A.S.A. 1947, § 31-101.

Publisher's Notes. As to the constitutionality of this section, see case notes for McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

CASE NOTES

Analysis

Constitutionality.
Claims arising upon contract.
—Foreign corporations.
—Nonresidents.
Determination of grounds.
Disposal of property.
—About to sell, etc.
—Cheat, hinder, or delay.
—Fraudulent intent.
Insufficient grounds.
Property, etc., subject to attachment.
Removing property from state.
Writ of attachment.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; expressly overruling Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

The lack of prompt notice to the debtor of a prejudgment attachment and of possible state or federal exemptions and the lack of a prompt hearing at which the debtor can claim exemptions leaves the prejudgment attachment provisions inadequate to prevent an erroneous deprivation of property in violation of due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

Claims Arising Upon Contract.

This section has reference only to debts or demands due. Lemay v. Williams, 32 Ark. 166 (1877).

An attachment may issue against a nonresident for refusal to perform a contract although the damages claimed are unliquidated. Messinger v. Dunham, 62 Ark. 326, 35 S.W. 435 (1896).

A nonresident purchasing a tenant's crop knowing of a lien for rent is liable to the landlord on an implied contract. Judge v. Curtis, 72 Ark. 132, 78 S.W. 746 (1904).

A general attachment levied on the

property of a nonresident defendant for a violation of the state anti-trust laws by the attorney general to recover a penalty was invalid as a claim was not a debt arising upon a contract. State ex rel. Att'y Gen. v. Ehle, 112 Ark. 385, 166 S.W. 535 (1914).

—Foreign Corporations.

Where the writ of attachment is filed against a foreign corporation, this is in itself a sufficient ground for the attachment; when that ground is asserted, there is no statutory requirement that a fraudulent intent be shown. Sun Marine Terms. v. Tosco Corp., 287 Ark. 233, 697 S.W.2d 901 (1985).

—Nonresidents.

Residence in the attachment laws generally implies an established abode fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return at some time to the true domicile; an actual resident of this state, having a domicile in another, cannot be attached in this state as a nonresident. Krone v. Cooper, 43 Ark. 547 (1884).

When the debtor and creditor were domiciled in different states and the creditor proceeded by attachment in the courts of his domicile against the property of his debtor, there was no cause for interference by the courts of the debtor's domicile even though the creditor was found within their jurisdiction. Griffith v. Langsdale, 53 Ark. 71, 13 S.W. 733 (1890).

In proceedings by attachment against the property of a nonresident, this section must be strictly followed. Bush v. Visant, 40 Ark. 124 (1882); McClelland v. Linton, 121 Ark. 79, 180 S.W. 482 (1915).

Where the defendant lived in a hotel in the state for over a year in the same town where he carried on a real estate business and was absent from the state only for short periods on business, he was a "resident" of the state within the meaning of this section, though his domicile was in another state, and attachment against his property could not be obtained on the ground that he was a nonresident. Jarrell v. Leeper, 178 Ark. 6, 9 S.W.2d 778 (1928).

Where the defendants, after building a home in Arkansas, moved to Dallas and the husband was employed in California at the time of the trial, they were nonresidents within the meaning of this section as the words "residence" and "domicile" are not synonymous. Stephens v. AAA Lumber Co., 238 Ark. 842, 384 S.W.2d 943 (1964).

Determination of Grounds.

The better practice is for the trial court to determine the existence of the ground of attachment rather than to submit that issue to the jury; however, it is not reversible error. Ward v. Nu-Wa Laundry Cleaners, Inc., 205 Ark. 713, 170 S.W.2d 381 (1943).

Defendant who requested and secured two instructions on attachment issue could not predicate reversible error on submission of that issue to the jury. Ward v. Nu-Wa Laundry Cleaners, Inc., 205 Ark. 713, 170 S.W.2d 381 (1943).

It is proper for trial court to decide as to existence of alleged grounds for attachment rather than to submit such issue to the jury. Marvin v. Brooks, 225 Ark. 204, 281 S.W.2d 926 (1955).

Where evidence does not sustain allegations as to grounds for attachment, trial court is correct in finding that attachment is wrongfully issued. Marvin v. Brooks, 225 Ark. 204, 281 S.W.2d 926 (1955).

Disposal of Property.

An assignment for the benefit of creditors executed otherwise than required by statute is ground for attachment. Richmond v. Mississippi Mills, 52 Ark. 30, 11 S.W. 960 (1889); Box v. Goodbar, 54 Ark. 6, 14 S.W. 925 (1890).

Where the pleading contained an allegation that (1) the value of the security was diminishing and that the debtor was in the process of selling or disposing of the collateral, (2) that the collateral was in danger of being sold, concealed, or moved from the premises in derogation of the rights and interest of the secured party without the proceeds being applied to the debt and contrary to the terms of the security agreement, and (3) where it was further alleged that, if the property were not attached, it would greatly diminish, the allegations made by the secured party stated a ground for attachment. Hackworth v. First Nat'l Bank, 265 Ark. 668, 580 S.W.2d 465 (1979).

Disposing of property to pay debts and applying the proceeds thereto in the usual course of business is not fraudulent within

the meaning of this section. Bank of Yellville v. Scott, 113 Bankr. 516 (Bankr. W.D. Ark. 1990).

—About to Sell, Etc.

Where the plaintiff alleges only that the defendant is about to sell or convey his property with fraudulent intent, an instruction that the plaintiff must prove that the defendant had, at the date of issuing the attachment, sold or disposed of his property with such fraudulent intent is erroneous since it is sufficient to prove that he was about to do so. Waples-Platter Co. v. Low, 54 F. 93 (8th Cir. 1893).

—Cheat, Hinder, or Delay.

A pledge of choses in action to a trustee for the benefit of certain creditors does not constitute an assignment for the benefit of creditors since an equitable estate remains in the pledgor; nor does it hinder or delay unsecured creditors since they may reach the pledgor's equitable estate under process. Goodbar v. Locke, 56 Ark. 314, 19 S.W. 924 (1892).

Evidence in action on note executed by husband and wife operating separate drug stores, for merchandise furnished to wife's store, was held to justify issuance of attachment on ground of husband's insolvency and removal of merchandise from wife's store to husband's store, together with failure to pay creditors. Archer Drug Co. v. Kimpel, 202 Ark. 27, 150 S.W.2d 605 (1941).

Property of debtor residing in another county could not be attached based on affidavit that debtor was intending to hinder or delay his creditors. Mahan v. Parks, 220 Ark. 514, 248 S.W.2d 880 (1952).

—Fraudulent Intent.

Fraudulent intent may be inferred when the debtor, while seeking an extension of time for payment, asserts that his assets are in excess of liabilities and at the same time threatens that, if the extension is not granted, a disposition of property would be made so that the creditor would realize nothing. Hanks v. Andrews, 53 Ark. 327, 13 S.W. 1102 (1890).

Proof that a few hours after the levy the debtor made a fraudulent disposition of property was not conclusive evidence that a fraudulent disposition was contemplated at the time the attachment was issued. Blass v. Lee, 55 Ark. 329, 18 S.W. 186 (1892).

The preference in an assignment of a creditor, in excess of his debt, with the intent to subsequently direct the payment of the excess to another creditor, is a fraud which vitiates the assignment and sustains the attachment. Waples-Platter Co. v. Low, 54 F. 93 (8th Cir. 1893).

Evidence that a merchant in failing circumstances sold his entire stock to one creditor to cancel debt and for additional cash, and thereafter collected outstanding claims but made only small payments to creditors, justified attachment on ground of fraudulent intent to hinder creditors. Shibley & Wood Grocery Co. v. Ferguson, 60 Ark. 160, 29 S.W. 275 (1895).

It was error to refuse evidence of attempted fraudulent disposition although such attempt was subsequent to the attachment. Milwaukee Harvester Co. v. Tymich, 68 Ark. 225, 58 S.W. 252 (1900).

In making a general assignment for the benefit of creditors, a secret reservation of an interest will constitute grounds for attachment for making a fraudulent disposition of property. Winter v. Kirby, 68 Ark. 471, 60 S.W. 34 (1900).

Disposing of property to pay debts and applying the proceeds thereto is not fraudulent. Blakemore v. Eagle, 73 Ark. 477, 84 S.W. 637 (1905).

When a sale is made by an insolvent debtor and proceeds are withheld from creditors, there is the inference that the sale was made with fraudulent intent to cheat creditors. Farris v. Gross, 75 Ark. 391, 87 S.W. 633 (1905).

The sale of property by an insolvent debtor in the usual course of business or for the purpose of paying debts does not constitute grounds for attachment; but where it can be shown that such sale was made for the fraudulent purpose of converting the property into money, so as to place it beyond the reach of creditors by execution or other process, a ground for attachment is made. Arkansas Nat'l Bank v. Stuckey, 121 Ark. 302, 181 S.W. 913 (1915).

Sale of property by an insolvent debtor for the fraudulent purpose of converting it into money to be placed beyond the reach of creditors constitutes a ground for attachment even if such sales be made in the usual course of business. Archer Drug Co. v. Kimpel, 202 Ark. 27, 150 S.W.2d 605 (1941).

Insufficient Grounds.

Attachment cannot be issued in suit to compel marshaling of assets. Buck v. Bransford, 58 Ark. 289, 24 S.W. 103 (1893).

Property, Etc., Subject to Attachment.

Where an attachment is sued out against two persons jointly, it may be sustained as against the property of one alone. Allen, West & Bush v. Clayton & Prewitt, 11 F. 73 (E.D. Ark. 1882).

The individual property of an innocent partner is not subject to attachment at the instance of a firm creditor for the fraud of a copartner. Worthley v. Goodbar, 53 Ark. 1, 13 S.W. 216 (1890).

Partnership property is not subject to attachment by a creditor of one of the partners until there has been executed a bond to his copartner by one or more sureties to the effect that he will pay to such copartner the damages he may sustain by the wrongful suing out of order. Noble v. Knobel Hoop Co., 85 Ark. 306, 107 S.W. 988 (1908).

Where materials are furnished to a contractor to be used in the construction of a building, the presumption is that they were furnished on the credit of the building and its owner; unless such presumption is rebutted by proof that they were furnished on the personal credit of the contractor, they will not be subject to attachment at the instance of the contractor's creditors. Pratt v. Nakdimen, 99 Ark. 293, 138 S.W. 974 (1911).

Estate of devisee is subject to attachment against him in same manner as other beneficial legal estates. Taylor v. Bacon, 102 Ark. 97, 142 S.W. 1128 (1912).

Trial court did not err in finding that funds in the hands of a garnishee obtained to pay a judgment debtor's attorney's fees were subject to garnishment by the judgment creditor; although the garnishee, the debtor's wife, maintained that those funds were in a constructive trust to pay the debtor's attorney, there was no proof that the money was assigned to the debtor's counsel for payment of attorney fees prior to the writ of garnishment being served. Hudson v. Cook, 82 Ark. App. 246, 105 S.W.3d 821 (2003).

Removing Property from State.

If a debtor is removing his property out of the state without leaving sufficient property to pay all his debts, a creditor may attach even though sufficient property is left to pay his debts; further, testimony of other debts is admissible to prove the insufficiency of the property to pay all debts. Holliday v. Cohen, 34 Ark. 707 (1879).

The removal by a debtor of a material portion of his property outside the state, not leaving sufficient property to pay his debts, is cause for attachment even if he has no intention to cheat, hinder, or delay his creditors. Durr v. Hervey, 44 Ark. 301 (1884).

The removal by a corporation of a material part of its property out of the state, not leaving enough to pay debts, is grounds for attachment. Simon v. Sevier County Co-op. Ass'n, 54 Ark. 58, 14 S.W. 1101 (1890).

A debtor who removed a material part of his property outside the state without leaving sufficient property to pay his debts, although the removed property was shipped in payment of a debt owed to the consignee and such shipment was not with fraudulent intent to cheat, hinder, and delay his creditors, was subject to attachment. Goodbar v. Bailey, 57 Ark. 611, 22 S.W. 568 (1893).

Under subdivision (1)(A)(vi) of this section, the word "property" does not mean all the debtor's property and, hence, there is not inconsistency is in alleging in the affidavit for attachment that the defendants have disposed of their property and that they are about to dispose of the property. Salmon v. Mills, 68 F. 180 (8th Cir. 1895).

True test in determining whether an attached debtor has left enough property in the state to pay debts is to ascertain whether at its fair market value it is sufficient. Nesbit v. Schwab Clothing Co., 62 Ark. 22, 34 S.W. 79 (1896); Foster v. Pitts, 63 Ark. 387, 38 S.W. 1114 (1897).

Where a farmer abandoned his crop and the landlord took possession of the crop and gathered and sold it, and at the same time attached his goods upon the grounds that he was about to remove his property from the state without leaving enough to pay his claim, the validity of the attachment depended on whether the market value of the crop at the time of the attachment was equal to the landlord's claim. Southern Orchard Planting Co. v. Turner, 87 Ark. 382, 112 S.W. 956 (1908).

Writ of Attachment.

Using a writ of attachment to foreclose an existing consensual lien is superfluous since typically a writ of attachment is a remedy designed to create a pre-judgment lien in favor of an unsecured creditor. Bank of Yellville v. Scott, 113 Bankr. 516 (Bankr. W.D. Ark. 1990).

16-110-102. Garnishment generally.

(a)(1) Whenever, in a civil action, the plaintiff shall have reason to believe that any other person is indebted to the defendant or has in his or her hands or possession goods and chattels, moneys, credits, and effects belonging to the defendant, the plaintiff may sue out a writ of garnishment. This writ shall set forth his or her cause of action against the defendant, and command the officer charged with the execution thereof to summon the person named therein as garnishee to appear at the return day of the summons in the action if the writ shall have been issued at the commencement thereof and, if not so issued, on such day as the court shall designate to answer what goods, chattels, moneys, credits, and effects he may have in his or her hands or possession belonging to the defendant.

(2) In all such actions where the plaintiff has obtained judgment, he or she may sue out a writ of garnishment setting forth the judgment and shall proceed in the manner directed for the enforcement and collection thereof.

(b) The plaintiffs in all cases of garnishment may also have an attachment against the property of a garnishee, who is made a defendant thereto, by stating in his or her affidavit one (1) or more of the grounds of attachment mentioned in §§ 16-110-101, 16-110-104, 16-110-202, or 16-110-203 and the amount for which the garnishee is indebted to the principal debtor, and by executing bond to the garnishee.

History. Civil Code, § 224; Acts 1871, No. 48, § 1 [224], p. 219; C. & M. Dig., §§ 503, 504; Pope's Dig., §§ 540, 541; A.S.A. 1947, §§ 31-102, 31-142.

RESEARCH REFERENCES

Ark. L. Rev. Note, Holdway v. Duvoisin: Garnishment Payments as Preferences Under Section 547, 43 Ark. L. Rev. 217.

CASE NOTES

Analysis

Applicability.
Interpleader by garnishee.
Liable to garnishment.
Lien of garnishment.
Right to reach debt.
Setoff.
Tort actions.

Applicability.

It is only in suits by attachment that subsection (a) authorizes the issuance of a writ of garnishment before judgment against the defendant. Leingardt v. Deitz, 30 Ark. 224 (1875); Littlejohn v. Lewis, 32 Ark. 423 (1877).

Interpleader by Garnishee.

Where the garnishee had filed in interpleader and did not contest the validity of the garnishments, the garnishee's rights were guarded and the garnishments were valid. Equifax, Inc. v. Luster, 463 F. Supp. 352 (E.D. Ark. 1978), aff'd sub nom,

United States v. Olson, 604 F.2d 29 (8th Cir. 1979).

Liable to Garnishment.

Executors and administrators are not, as such, liable to garnishment. Thorn & Robins v. Woodruff, 5 Ark. 55 (1843); Gill v. Middleton, 60 Ark. 213, 29 S.W. 465 (1895).

A judgment debtor is not liable to garnishment. Trowbridge & Jennings v. Means, 5 Ark. 135 (1843); Fowler v. McClelland, 5 Ark. 188 (1843); Tunstall v. Means, 5 Ark. 700 (1844).

A judgment debtor might be subject to garnishment if there is not a resultant clash of jurisdictions and the garnishee subjected to the hazard of paying the same debt twice. Saint Louis, I.M. & S. Ry. v. Richter, 48 Ark. 349, 3 S.W. 56 (1886).

There was substantial evidence to support the court's finding that the defendant had in its hands or possession property belonging to the garnishor and was, therefore, properly held liable as garnishee even though it owed no debt to the garnishor. L & S Concrete Co. v. Bibler Bros., 34 Ark. App. 181, 807 S.W.2d 50 (1991).

Although the garnishee, the debtor's wife, maintained the debtors funds were in a constructive trust to pay the debtor's attorney, there was no proof that the money was assigned to the debtor's counsel for payment of attorney fees prior to the writ of garnishment being served; thus, the facts differed from those in which there were formal assignments to the other creditor before the garnishment of the funds in question, and the funds were subject to garnishment by the judgment creditor. Hudson v. Cook, 82 Ark. App. 246, 105 S.W.3d 821 (2003).

Lien of Garnishment.

The lien of a garnishment dates from the time the garnishment writ is served upon the garnishee, and a sale and transfer by the defendant of choses in action, not subject to execution, before such service will be good. Bergman v. Sells & Co., 39 Ark. 97 (1882).

A lien is fixed upon the assets in the hands of a garnishee by the service of the garnishment upon him, and he cannot afterwards pay any portion of them to attorneys for defending the attachment suit. Adams v. Penzell & Co., 40 Ark. 531 (1883).

Right to Reach Debt.

The right to reach a debt is not affected by it being in suit. Saint Louis, I.M. & S. Ry. v. Richter, 48 Ark. 349, 3 S.W. 56 (1886).

An action begun by a plaintiff in an attachment suit against one summoned therein as a garnishee is an ancillary proceeding and cannot be prosecuted to judgment before the plaintiff has recovered judgment in the principal suit. Adler-Goldman Comm. Co. v. Bloom, 62 Ark. 616, 37 S.W. 305 (1896).

Setoff.

A debt due from a sole plaintiff to one of several defendants may be pleaded as a setoff by the defendant to whom such debt is due. Leach v. Lambeth, 14 Ark. 668 (1854).

Tort Actions.

Garnishment is a specie of attachment and historical background shows that attachment in tort action is restricted to cases where defendant is a nonresident; thus, plaintiff was not entitled to garnish bank account of a defendant in an action for personal injuries resulting from gunshot wounds, even though § 16-110-401 on its face permits garnishment in all actions where plaintiff has knowledge that another person owes the defendant. Allen v. Stracener, 214 Ark. 688, 217 S.W.2d 620 (1949).

16-110-103. Attachment in tort actions.

(a) In actions for torts committed in this state or to recover statutory penalties, a writ of attachment may be issued against the property of a defendant who is a nonresident of the state in the same manner as in actions ex contractu.

(b) Before the clerk shall issue a writ of attachment in the action, the plaintiff shall make an affidavit and execute a bond in the same manner as provided by law in other cases of attachment.

History. Acts 1915, No. 290, § 21; C. & M. Dig., § 495; Pope's Dig., § 532; Acts 1947, No. 153, § 1; A.S.A. 1947, § 31-103.

RESEARCH REFERENCES

Ark. L. Rev. Acts of 1947: Attachment in Tort Actions, 1 Ark. L. Rev. 223.

CASE NOTES

Analysis

Construction.
Affidavit and bond.
Jurisdiction.

Construction.

Proceedings by attachment against the property of a nonresident is statutory, out of the course of the common law, and must be strictly followed to make a valid sale of property. Sinclair Ref. Co. v. Bounds, 198 Ark. 149, 127 S.W.2d 629 (1939).

Affidavit and Bond.

Affidavit for attachment in tort action against foreign corporation which failed to state that the corporation could not be served in person with process in the action within the state was fatally defective and attachment secured thereon was void. Sinclair Ref. Co. v. Bounds, 198 Ark. 149, 127 S.W.2d 629 (1939).

In action by the state for the use and benefit of a county against foreign corporation to recover statutory penalty for doing business in the state without qualifying under statutes, denial of corporation's motion to quash attachment of truck on ground that the state failed to make affidavit and execute bond was not error since the state is not required to give bond or security for costs in any case, nor is it required to verify its pleadings. Vaccinol Prods. Corp. v. State ex rel. Phillips County, 203 Ark. 302, 156 S.W.2d 250 (1941).

Jurisdiction.

Before an attachment can be obtained in a tort action, the defendant must not only be a nonresident of the state but also such a nonresident that cannot be served in person with process in the action within the state. Sinclair Ref. Co. v. Bounds, 198 Ark. 149, 127 S.W.2d 629 (1939).

Service on foreign soup company by publication as result of a writ in attachment was invalid where sheriff made a return of no property seized as jurisdiction of court is based on seizure of property of the defendant in an attachment proceeding. Rodgers v. Howard, 215 Ark. 43, 219 S.W.2d 240 (1949).

16-110-104. Attachment before debt due.

(a) In an action brought by a creditor against his or her debtor, the plaintiff may, before his or her claim is due, have an attachment against the property of the debtor, where:

(1) The debtor has sold, conveyed, or otherwise disposed of his or her property or suffered or permitted it to be sold, with the fraudulent intent to cheat or defraud his or her creditors, or to hinder or delay them in the collection of their debts; or,

(2) The debtor is about to make such fraudulent sale, conveyance, or disposition of his or her property with such intent; or,

(3) The debtor is about to remove his or her property, or a material part thereof, out of this state with the intent or to the effect of cheating or defrauding his or her creditors or of hindering or delaying them in the collection of their debts.

(b) The attachment authorized by subsection (a) of this section may be granted by the court in which the action is brought, by the clerk or judge thereof, or by any circuit judge in vacation, where the complaint, verified by oath of the plaintiff, his or her agent, or attorney, shows:

(1) Any of the grounds for attachment enumerated in that subsection;

(2) The nature and amount of the plaintiff's claim; and

(3) When the claim becomes due.

(c) The order of the court, clerk, or judge granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim, and the probable costs of the action.

(d) The order of attachment as granted by the court, clerk, or judge shall not be issued by the clerk until there has been executed in his or her office such bond on the part of the plaintiff as is directed in § 16-110-107.

(e) Provisions of §§ 221-258 of the Civil Code shall, so far as they are applicable, regulate attachments authorized by the article.

History. Civil Code, §§ 259-263; Acts 1871, No. 48, § 1 [260], p. 219; 1881, No. 53, § 1, p. 99; C. & M. Dig., §§ 549-553; Pope's Dig., §§ 586-590; A.S.A. 1947, §§ 31-201 — 31-205.

Publisher's Notes. The Civil Code, referred to in this section, means Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

As to the constitutionality of this section, see case notes for McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

CASE NOTES

Analysis

Constitutionality.
Attachment authorized.
Attachment not allowed.
Order of attachment.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlory Bank & Trust, 281 Ark. 371, 633 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

The lack of prompt notice to the debtor of a prejudgment attachment and of possible state or federal exemptions and the lack of a prompt hearing at which the debtor can claim exemptions leaves the prejudgment attachment provisions inadequate to prevent an erroneous deprivation of property in violation of due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

Attachment Authorized.

A debt not due may be consolidated with one that is due and attachment issued for the aggregate sum when grounds applicable to both are alleged. Kahn v. Kuhn, 44 Ark. 404 (1884).

Where a debt became due before the action was heard and determined, it was proper to render personal judgment on the debt without issuing a new summons. Hutchinson v. First Nat'l Bank, 156 Ark. 142, 246 S.W. 484 (1922).

Attachment Not Allowed.

Shipment of cotton by debtor to creditor in another state to pay debt in good faith would not authorize attachment. Rice, Stix & Co. v. Pertuis, 40 Ark. 157 (1882).

Junior attachment creditors could intervene to show there was no ground for attachment before debt due. Davis v. H.B. Claflin Co., 63 Ark. 157, 38 S.W. 662, 41 S.W. 996 (1896).

Order of Attachment.

The purpose of the requirement that the order of the court or judge specify the amount of the claim is to provide a means by which the clerk should be able to ascertain what amount to insert in the attachment; therefore, it is not necessary for the clerk to make an order specifying the amount for which the attachment is allowed. People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co., 51 F. 130 (8th Cir. 1892).

It is not necessary for the clerk to make the order of attachment when he issues it. Baker v. Ayers, 58 Ark. 524, 25 S.W. 834 (1894).

Cited: Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-105. Venue.

Attachments may be sued out, and the actions in which the attachments are obtained may be prosecuted, in any county in which property may be attached or where a garnishee, who is indebted or has property belonging to the defendant, is served with process.

History. Civil Code, § 223; C. & M. Dig., § 502; Pope's Dig., § 539; A.S.A. 1947, § 31-104.

CASE NOTES

Analysis

In general.
Applicability.

In General.

Attachment proceedings may be prosecuted in any county where property of nonresident found. Umsted Auto Co. v. Edwards, 159 Ark. 327, 251 S.W. 878 (1923).

Property of debtor residing in another county could not be attached based on affidavit that debtor was intending to hinder or delay his creditors. Mahan v. Parks, 220 Ark. 514, 248 S.W.2d 880 (1952).

Applicability.

This section applies only to attachment and garnishment sued out upon the statutory grounds enumerated in § 16-110-101 and has no application to a garnishment sued out under § 16-110-401. Hancock v. Gibson, 72 Ark. 322, 79 S.W. 1061 (1904).

Cited: Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-106. Order of attachment.

(a)(1) An order of attachment shall be made by the clerk of the court in which the action is brought in any case mentioned in subdivision (1) of § 16-110-101, where there is filed in his or her office an affidavit of the plaintiff or of someone in his or her behalf, showing:

(A) The nature of the plaintiff's claim;

(B) That it is just;

(C) The amount which the affiant believes the plaintiff ought to recover; and

(D) The existence in the action of one (1) of the grounds for an attachment enumerated in subdivision (1) of § 16-110-101. In the case mentioned in subdivision (2) of § 16-110-101, where it is shown by affidavit or by the return of the sheriff or other officer upon the order for the delivery of the property claimed, the facts mentioned in that subdivision must exist.

(2) When the return by the proper officer upon a summons against a defendant states that he or she has left the county to avoid the service of the summons or has concealed himself or herself therein for that purpose, it shall be equivalent to the statement of the fact in the affidavit mentioned in subdivision (a)(1) of this section.

(b)(1) The affidavit or grounds of attachment, may be amended so as to embrace any grounds of attachment that may exist up to, and until, the final judgment upon the attachments. If the amendment embraces grounds existing at the time of the commencement of the proceedings, and is sustained upon such grounds, the lien created by the suing out or levying of the original attachment shall be held to be good.

(2) However, if the amendments embrace new grounds not existing at the time of suing out the original attachment and the attachment shall be sustained on the new grounds only, the lien shall exist on the property, levied upon from the filing of the original attachment.

(3) A general order sustaining the attachment without designating the grounds upon which it is sustained shall be equivalent to sustaining the order on grounds that existed at the time the attachment was sued out.

(c)(1) The order of attachment shall be directed and delivered to the sheriff or other officer, with as many copies thereof as the plaintiff may direct.

(2) It shall require him or her to attach and safely keep the property of the defendant in his or her county not exempt from execution, or so much thereof as will satisfy the plaintiff's claim specified in his affidavit, which shall be stated in the order and the probable costs of the action, not exceeding thirty dollars ($30.00). It shall also require him or her to summon the garnishees to answer in the action on the return day of the order and to make due return thereof.

(3) The return day of the order of attachment when issued at the commencement of the action shall be the same as that of the summons. When the order of attachment is issued afterward, the commencement of the action may be another day in term at the option of the plaintiff.

History. Civil Code, §§ 217, 218, 220, 222; Acts 1871, No. 48, § 1 [217], p. 219; C. & M. Dig., §§ 496, 497, 499, 501; Pope's Dig., §§ 533, 534, 536, 538; A.S.A. 1947, §§ 31-105 — 31-107, 31-110.

Publisher's Notes. As to the constitutionality of this section, see case notes for McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

CASE NOTES

Analysis

Constitutionality.
In general.
Affidavits.
—Amendment.
—Contents.
Complaint.
Contents of order.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the

issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

The lack of prompt notice to the debtor of a prejudgment attachment and of possible state or federal exemptions, and the lack of a prompt hearing at which the debtor can claim exemptions, leaves the prejudgment attachment provisions inadequate to prevent an erroneous deprivation of property in violation of due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

In General.

Where affidavit and complaint were marked "filed" and the bond "approved" and writs issued and delivered to the officer before he took the papers to the clerk's office, which he did immediately after these acts and deposited them in their proper place, this was a sufficient compliance with this section to make the process good. People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co., 51 F. 130 (8th Cir. 1892).

Affidavits.

The defendant could not object in the Arkansas Supreme Court for the first time, that the affidavit for the attachment was insufficient; such objection had to be first made in the circuit court. Fletcher v. Menken, 37 Ark. 206 (1881).

An affidavit for attachment improperly signed, or not signed at all, or without the jurat of the officer is defective; however, but such defects are amendable. Fortenheim v. Claflin, 47 Ark. 49, 14 S.W. 462 (1885).

—Amendment.

An affidavit for an attachment may be amended by inserting an omitted fact existing when it was made before judgment to quash for the insufficiency. Rogers v. Cooper, 33 Ark. 406 (1878); Nolen v. Royston, 36 Ark. 561 (1880).

An affidavit in the court of a justice of the peace may be amended after appeal in the circuit court if the amendment contains no cause for the attachment not existing at the commencement of the suit. Sherrill v. Bench & Bros., 37 Ark. 560 (1881).

An order of attachment not running in the name of the state is amendable, and it should be amended by the court of its own motion or be considered amended. Kahn v. Kuhn, 44 Ark. 404 (1884).

On appeal, an affidavit in attachment will not be considered amended to conform to the proof of a new ground of attachment not existing at the time the original attachment was sued out when no offer to amend was made at the trial. Blass v. Lee, 55 Ark. 329, 18 S.W. 186 (1892); Hanger v. Ives, 69 Ark. 52, 62 S.W. 68 (1901).

An affidavit for attachment which is uncertain because the disjunctive is used between the statement of separate grounds may be amended. Salmon v. Mills, 49 F. 333 (8th Cir. 1892).

An affidavit may be amended before the trial. Sellers v. Bowie, 183 Ark. 726, 38 S.W.2d 560 (1931).

—Contents.

The affidavit must be positive; if made upon belief only, the attachment may be quashed at the instance of the defendant. Sannoner v. Jacobson, 47 Ark. 31, 14 S.W. 458 (1885).

An affidavit made upon belief is not a nullity, but is amendable. Landfair v. Lowman, 50 Ark. 446, 8 S.W. 188 (1887).

Complaint.

There can be no attachment without a complaint, and there should be both a complaint and an affidavit, but both may be included in the affidavit if it contains all the essentials of both. Sannoner v. Jacobson, 47 Ark. 31, 14 S.W. 458 (1885); Lehman v. Lowman, 50 Ark. 444, 8 S.W. 187 (1887).

Court acquired jurisdiction to issue writ of attachment although complaint was not verified as it is not required that both complaint and affidavit be verified. Smith v. Moschetti, 213 Ark. 968, 214 S.W.2d 73 (1948).

Contents of Order.

An order of attachment and a writ of summons may be embodied in the same writ. Weil & Bros. v. Kittay, 40 Ark. 528 (1883); Rice, Stix & Co. v. Dale & Richardson, 45 Ark. 34 (1885).

Cited: Hackworth v. First Nat'l Bank, 265 Ark. 668, 580 S.W.2d 465 (1979); Sun Marine Terms. v. Tosco Corp., 287 Ark. 233, 697 S.W.2d 901 (1985); Stephens v. Walker, 743 F. Supp. 670 (W.D. Ark. 1990); Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-107. Bond.

(a) The order of attachment shall not be issued by the clerk until there has been executed in his or her office, by one (1) or more sufficient sureties of the plaintiff, a bond to the effect that the plaintiff shall pay to the defendant all damages which he or she may sustain by reason of the attachment if the order is wrongfully obtained.

(b) The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff. If on the motion, the court is satisfied that the surety in the plaintiff's bond has removed from this state or is not sufficient for the amount thereof, it may vacate the order of attachment. It may direct restitution of any property taken under it unless in a reasonable time, to be fixed by the court, sufficient security is given by the plaintiff.

History. Civil Code, §§ 219, 258; C. & M. Dig., §§ 498, 548; Pope's Dig., §§ 535, 585; A.S.A. 1947, §§ 31-108, 31-109.

CASE NOTES

Analysis

Defects in bonds.
Failure to file.
Liability for damages.

Defects in Bonds.

When objections to an attachment bond are sustained by the court, the filing of an amended bond, under the leave and approval of the court, will cure the defects of the original bond and support the attachment and lien. Bergman v. Sells & Co., 39 Ark. 97 (1882).

Where ground of attachment is undisputed, defect in bond does not defeat jurisdiction. Hurley v. Bryan, 160 Ark. 277, 254 S.W. 694 (1923).

Failure to File.

The defendant could not object in the Arkansas Supreme Court, for the first time, that no bond was filed by the plaintiff before the order of attachment was issued; such objection had to be made in the circuit court. Fletcher v. Menken, 37 Ark. 206 (1881).

Failure to file bond is irregularity which may be waived. Austin v. Goodbar Shoe Co., 60 Ark. 444, 30 S.W. 888 (1895).

Where the defendant in an attachment suit before a justice of the peace went to trial without objecting that the plaintiff failed to file an attachment bond, he cannot object in the circuit court on appeal if the plaintiff is permitted to file such bond. Gamble v. Harvey-Greenhaw Mercantile Co., 89 Ark. 37, 115 S.W. 946 (1908).

Liability for Damages.

The measure of damages on the bond when property of a third person is attached is the actual value of the property at the time and place of attachment with interest thereon. Straub v. Wooten, 45 Ark. 112 (1885).

The bond is an absolute obligation to pay the court's judgment and it cannot be avoided by proof that the property was not subject to the attachment lien. Lott v. Porter, 97 Ark. 97, 133 S.W. 180 (1910).

A surety on an attachment bond who undertakes to pay all damages which may be sustained by the defendant is not liable for a trespass committed to the property of a third person. Maloney v. Jones-Wise Comm. Co., 117 Ark. 180, 174 S.W. 239 (1915).

In a suit on a promissory note and account and an affidavit for attachment, the defendant furnished a bond to pay all sums, including costs and damages, that might be charged against the defendant; when judgment was for the plaintiff and the property could not be produced, the defendant and his sureties were liable for a sum not exceeding the value of the

property. Wright v. Stevens, 212 Ark. 373, 205 S.W.2d 853 (1947).

Cited: McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988); Stephens v. Walker, 743 F. Supp. 670 (W.D. Ark. 1990); Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-108. Service of orders and processes.

The orders and processes in provisional remedies issued from the circuit or chancery court may be directed to, or served by, the sheriff or any other officer mentioned in § 16-58-107 [superseded] and shall be valid for all purposes as if the orders and processes had been served by the sheriff.

History. Civil Code, § 225; Acts 1871, No. 48, § 1 [225], p. 219; C. & M. Dig., § 505; Pope's Dig., § 542; A.S.A. 1947, § 31-111.

CASE NOTES

Improper Execution.

The plaintiff's right to an attachment is not affected by the manner in which the order of attachment is executed; the execution of the order, if wrongful, may be quashed, or the return, if defective, may be amended to conform to the facts, but in either case there is no cause for discharging the attachment. Kurtz v. Dunn, 36 Ark. 648 (1880).

Cited: Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-109. Priority of orders of attachment.

Where there are several orders of attachment against the same defendant, they shall be executed in the order in which they were received by the sheriff or other officer.

History. Civil Code, § 226; C. & M. Dig., § 506; Pope's Dig., § 543; A.S.A. 1947, § 31-112.

CASE NOTES

Analysis

Federal courts.
Seizure of property.
Writs going to deputies.

Federal Courts.

When the state statute provides for successive levies as well as for a method of settling all priorities of the several liens arising from successive levies, the United States marshal may make a levy or a writ of attachment sub modo, and such levy will be sufficient where the property is already in the custody of the law by virtue of a prior levy upon a writ issued by a state court to enable a plaintiff to assert his lien if the attachment is sustained as it may affect the property remaining after the satisfaction of the first attachment. Brooks v. Fry, 45 F. 776 (C.C.W.D. Ark. 1891).

Where a sheriff, to satisfy an attachment issued from a state court, levies upon a stock of goods in value exceeding the amount he is required to make, and a marshal, to satisfy an attachment issued from a federal court, makes a constructive levy upon such property in the sheriff's hands, the creditor attaching in the federal court, after establishing his claim in that court and presenting proper proof thereof to the state court, is entitled to appear in the latter court as an intervener and to share in the proceeds of the at-

tached property in his proper order. Goodbar v. Brooks, 57 Ark. 450, 22 S.W. 96 (1893).

Seizure of Property.

This section does not contemplate that the officer go through the empty formality of seizing afresh under each writ property of which is already in possession; the prior seizure inures to the benefit of the subsequent writs. Claflin v. Furstenheim, 49 Ark. 302, 5 S.W. 291 (1887).

Writs Going to Deputies.

When different writs go into the hands of different deputies, they stand as if they all went into the hands of the sheriff at the time each went into the deputies' hands and had been successively levied by him. Claflin v. Furstenheim, 49 Ark. 302, 5 S.W. 291 (1887).

Cited: Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-110. Issuance of orders of attachments to other counties.

(a) Orders of attachment may be issued to the sheriffs or other officers of other counties, and several of them may, at the option of the plaintiff, be issued at the same time or in succession.

(b) Only those attachments which have been executed in whole or in part shall be taxed in the costs unless otherwise directed by the court.

History. Civil Code, § 221; C. & M. Dig., § 500; Pope's Dig., § 537; A.S.A. 1947, § 31-113.

CASE NOTES

Cited: Ward v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-111. Execution of order of attachment generally.

(a) The order of attachment shall be executed by the sheriff or other officer without delay, in the following manner:

(1) Upon real property by leaving a copy of the order with the occupant thereof or, if there is no occupant, in a conspicuous place thereon;

(2) Upon personal property, capable of manual delivery, by taking it into his custody and holding it subject to the order of the court;

(3) Upon other personal property by delivering a copy of the order, with a notice specifying the property attached, to the person holding the property; or as to a debt or demand, to the person owing it; or as to stock in a corporation, or property held, or a debt or demand owing by it, to the chief officer, or to the secretary, cashier, treasurer, or managing agent thereof, and by summoning the person or corporation to answer as a garnishee in the action. The sheriff shall deliver copies to and summon such persons as garnishees as the plaintiff may direct.

(b) It shall be the duty of every person mentioned in subdivision (a)(3) of this section, to whom the sheriff shall apply therefor, to furnish him or her with a certificate of the number of shares of the defendant in the stock of the corporation, a description of the property held by the corporation or person belonging to, or for the benefit of, the defendant,

or the amount of the debt owing to the defendant by the corporation or person, whether due or not. A failure to perform this duty may be punished by the court as a contempt.

(c) A sheriff having an order of attachment, or for the delivery of property, may enter any building or enclosure containing the property, to take it; and, if necessary for this purpose, he or she may break the building or enclosure, having first publicly demanded the property.

(d) The defendant's personal property shall be first taken under an attachment. If enough thereof is not found, then his or her real property shall be taken.

History. Civil Code, §§ 227-229, 777; C. & M. Dig., §§ 507-509, 9166; Pope's Dig., §§ 544-546, 11828; A.S.A. 1947, §§ 31-114 — 31-117.

Publisher's Notes. As to the constitutionality of this section, see case notes for McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

CASE NOTES

Analysis

Constitutionality.
Corporate stock.
Debts or demands.
Personal property capable of manual delivery.

Constitutionality.

The lack of prompt notice to the debtor of a prejudgment attachment and of possible state or federal exemptions, and the lack of a prompt hearing at which the debtor can claim exemptions, leaves the prejudgment attachment provisions inadequate to prevent an erroneous deprivation of property in violation of due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

Corporate Stock.

A delivery by a sheriff of a notice to the proper officer of a corporation after the order of attachment had been filed in the clerk's office was a delivery after the sheriff's power to act had ceased to exist and, consequently, there was no attachment of the shares. Deutschman v. Byrne, 64 Ark. 111, 40 S.W. 780 (1897).

Delivery of a writ of attachment containing a garnishment clause to the president of a corporation is not sufficient to fix a lien on any stock in such corporation held by the debtor. H.B. Claflin Co. v. Bretzfelder, 69 Ark. 271, 62 S.W. 905 (1901).

Debts or Demands.

The jurisdiction of the circuit court over the funds in the hands of a garnishee is not dependent upon the amount of his indebtedness to the defendant. Moore v. Kelley, 47 Ark. 219, 1 S.W. 97 (1886).

A debtor's credits can only be levied upon by garnishment or judicial proceedings; a levy upon his books or accounts is a levy only upon the materials which compose them, i.e., the books themselves, and not the evidence of debts therein. Goodbar v. Lindsley, 51 Ark. 380, 11 S.W. 577 (1888).

Personal Property Capable of Manual Delivery.

To constitute an attachment of personal property capable of manual delivery, the sheriff must take the property into his custody and actual possession. Adler, Goldman & Co. v. Roth, 5 F. 895 (C.C.E.D. Ark. 1881).

A declaration by constable that he levied upon goods inside a building was not a valid levy as against a sheriff who subsequently took the goods into his custody. Meyer v. Missouri Glass Co., 65 Ark. 286, 45 S.W. 1062 (1898).

Where deputy sheriff under writ of attachment took the truck and drove it away without having the writ in his possession and without serving a copy on any person, there was no lack of service as an order of attachment may be executed upon personal property capable of manual delivery by the officer taking it into custody. Smith v. Moschetti, 213 Ark. 968, 214 S.W.2d 73 (1948).

Cited: Hackworth v. First Nat'l Bank, 265 Ark. 668, 580 S.W.2d 465 (1979); Ward

v. Dapper Dan Cleaners & Laundry, Inc., 309 Ark. 192, 828 S.W.2d 833 (1992).

16-110-112. Attachment of funds in court.

(a) Where the property to be attached is a fund in court, the execution of the order of attachment shall be made by leaving with the clerk of the court a copy thereof, with a notice specifying the fund.

(b) Where several orders of attachment are executed upon the fund on the same day, they shall be satisfied out of it ratably.

History. Civil Code, § 230; C. & M. Dig., § 510; Pope's Dig., § 547; A.S.A. 1947, § 31-118.

CASE NOTES

Analysis

In general.
Bail money.
Balance of funds.
Proceeds of partition sales.

In General.

As a general rule, a fund in court becomes subject to garnishment upon entry of a judgment ordering its payment to the garnishment debtor. Hooten v. Conklin, 236 Ark. 911, 370 S.W.2d 607 (1963).

Where chancellor awarded garnishment debtor portion of funds which defendant in suit by the garnishment debtor had deposited into court in order to avoid interference with oil runs, these funds could be reached by writ of garnishment notwithstanding that suit by garnishment debtor was subsequently dismissed on stipulation of parties. Hooten v. Conklin, 236 Ark. 911, 370 S.W.2d 607 (1963).

A fund subject to control and disposition by a court, and not by any of the parties, is subject to garnishment even though there has been no order to pay the fund to the debtor. Saunders v. Adcock, 249 Ark. 856, 462 S.W.2d 219 (1971).

Bail Money.

Funds held by the sheriff as bail money in lieu of an appearance bond are subject to garnishment. McGill v. Robbins, 231 Ark. 411, 329 S.W.2d 540 (1959).

Money deposited by a criminal defendant in lieu of bail is not deemed to belong to him; it would have disastrous effect on the bail bond system if money put up by a bondsman were held to be subject to garnishment for the debts of the criminal defendant. Cessna Fin. Corp v. Skelton, 287 Ark. 378, 700 S.W.2d 44 (1985).

Balance of Funds.

A balance remaining in the hands of the clerk of the court after the purposes have been accomplished for which the fund was places in his hands is subject to attachment. Green v. Robertson, 80 Ark. 1, 96 S.W. 138 (1906).

Proceeds of Partition Sales.

Widow's share of the proceeds of a partition sale in possession of chancery clerk who conducted the sale was a fund in court subject to garnishment based on judgment obtained by heirs against widow for their share of rents and profits derived by her from the realty since her husband's death. Dove v. Donn, 203 Ark. 719, 158 S.W.2d 259 (1942).

Cited: Deutschman v. Byrne, 64 Ark. 111, 40 S.W. 780 (1897); H.B. Claflin Co. v. Bretzfelder, 69 Ark. 271, 62 S.W. 905 (1901); Independence Fed. Bank v. Paine Webber, 302 Ark. 324, 789 S.W.2d 725 (1990).

16-110-113. Attachment on joint or common property.

The sheriff shall not, in executing an order of attachment upon personal property held by the defendant jointly or in common with another person, take possession of the property until there has been

executed a bond to the other person, by one (1) or more sufficient sureties of the plaintiff, to the effect that he will pay to the person the damages he or she may sustain by the wrongful suing out of the order.

History. Civil Code, § 231; C. & M. Dig., § 511; Pope's Dig., § 548; A.S.A. 1947, § 31-119.

CASE NOTES

Partnership Property.

Partnership property cannot be attached by a creditor of one of the partners until after the execution of a bond in favor of the other partners. Noble v. Knobel Hoop Co., 85 Ark. 306, 107 S.W. 988 (1908).

16-110-114. Attachment on property claimed by another.

(a) When any sheriff shall levy a writ of attachment upon property claimed by a person not a party to the writ, the person may make oath to the property. The property shall then be delivered to the claimant upon him or her, or his of her attorney, giving bond in favor of the plaintiff, with good and sufficient security, to be approved by the sheriff, in a sum double the value of the property attached.

(b) Value shall be ascertained by the oaths of two (2) citizens of the county where the writ is levied, to be chosen by the sheriff, on the condition that he or she will interplead at the term of the court to which the writ shall be returnable and that he or she will prosecute the interpleader to judgment without delay. If, on the trial of the interpleader, the property shall be found to be the property of the defendant in the writ and the plaintiff shall recover judgment against the defendant, the property shall be delivered to the sheriff, or his or her successor in office, whenever demanded by the sheriff, after execution upon the judgment comes to his or her hand to be levied thereon. The bond shall be returned by the sheriff with the writ.

(c) If any person to whom the property is so returned shall neglect or refuse to deliver the property to the sheriff in office, in accordance with the condition of the bond, it shall be the duty of the sheriff, forthwith, to return the writ of fieri facias, issued upon the judgment rendered in the cause, setting forth the fact that the condition of the bond has been broken.

(d) The bond shall, in addition to the provisions of subsections (a)-(c) of this section, contain a condition, that in case the property so levied upon shall not be delivered, the bond shall have the force and effect of a judgment for the amount of the appraised value of the property and the costs of interpleading, if the appraised value is less than the amount of the judgment rendered in favor of the plaintiff against the defendant, and if the appraised value exceeds the amount of the judgment, then for the amount of the judgment, and all the costs, on which judgment execution may be issued against all the obligors thereof.

(e) On the return of the writ of fieri facias, showing the forfeiture of the bond, it shall be the duty of the clerk of the court to which the writ

is returned to issue an execution in favor of the plaintiff against all obligors, for the amount which may be due on the forfeited bond, in accordance with the provisions of subsections (a)-(d) of this section.

History. Acts 1861, No. 146, §§ 1, 2, p. 296; C. & M. Dig., §§ 579-584; Pope's Dig., §§ 616-621; A.S.A. 1947, §§ 31-120, 31-121.

CASE NOTES

Analysis

In general.
Applicability.
Appraisement.
Bond.
Evidence.
Judgment.
Pleadings.

In General.

An intervener may present his claim to the attached property as an independent proceeding without reference to any controversy between other parties, and the determination of it does not affect the right of property as between him and the defendant in the attachment of other person. Bloom v. McGehee, 38 Ark. 329 (1881).

Applicability.

This section applies as well to property about to be sold under a special execution in attachment as to that levied on under a general execution. State v. Spikes, 33 Ark. 801 (1878).

This section does not apply to the assignee of a foreign judgment. Gebhart v. Merchant, 84 Ark. 426, 105 S.W. 1036 (1907).

Appraisement.

The appraisement is the foundation of judgment. Turner v. Collier & Davis, 37 Ark. 528 (1881).

The value of goods in controversy is ascertained by appraisement at the time the retaining bond is executed by interveners. Faulkner v. Cook, 83 Ark. 205, 103 S.W. 384 (1907).

Bond.

Intervener giving bond for attached property does not exempt it from subsequent levy in another case. Harris v. Stewart, 65 Ark. 566, 47 S.W. 634 (1898).

Sheriff is not protected in delivering attached property to a claimant without bond. Fitzhugh v. Hackley, 70 Ark. 54, 66 S.W. 146 (1902).

Money deposited in lieu of bond is to be treated as a pledge for the return of the chattel, and not as being absolutely liable for the judgment. Fondren v. Norton, 86 Ark. 410, 111 S.W. 647 (1908).

Evidence.

The burden of proof is on the intervener who is entitled to open and conclude. Excelsior Mfg. Co. v. Owens, 58 Ark. 556, 25 S.W. 868 (1894).

On the trial of an intervention in an attachment suit, where the plaintiff admits the sale and delivery of possession of the attached property to the intervener before an attachment, but alleges that the sale was fraudulent, the burden of proof is on the plaintiff and he is entitled to open and conclude the argument. Mansur & Tebbetts Implement Co. v. Davis, 61 Ark. 627, 33 S.W. 1074 (1896).

Intervention and attachment being tried together, intervener cannot object to evidence competent on attachment issue. Carl & Tobey Co. v. Beal & Fletcher Grocer Co., 64 Ark. 373, 42 S.W. 664 (1897).

Judgment.

On the trial of the interplea, if the property be found subject to the attachment, the judgment should be that the plaintiff have execution against the property and, if the same is not delivered to the sheriff by the interpleader on demand, that execution issue, on the facts in the scire facias by the sheriff, against the interpleader and his securities. Adams v. Hobbs, 27 Ark. 1 (1871).

Judgment does not accrue until the officer shows by his return on the fieri facias issued against the defendant in the original action the failure of the obligators to deliver the property according to the conditions of the bond. Turner v. Collier & Davis, 37 Ark. 528 (1881).

When attached property has been sold

under orders of the court and the proceeds are in the hands of the sheriff, a judgment cannot be rendered in favor of an interpleader against the plaintiff in an attachment for the value of the property. Maloney v. Jones-Wise Comm. Co., 117 Ark. 180, 174 S.W. 239 (1915).

Pleadings.

The answer to an interplea in the circuit court should be written. Rosewater v. Schwab Clothing Co., 58 Ark. 446, 25 S.W. 73 (1894).

It is too late, after judgment, for the intervener to allege that the debt has been paid. Faulkner v. Cook, 83 Ark. 205, 103 S.W. 384 (1907).

An unverified petition is good after judgment. Burke v. Sharpe, 88 Ark. 433, 115 S.W. 145 (1908).

16-110-115. Lien of attachment on property of defendant.

(a) An order of attachment binds the defendant's property in the county, which might be seized under an execution against him or her, from the time of the delivery of the order to the sheriff or other officer.

(b) The lien to the plaintiff is completed upon any property or demand of the defendant by executing the order upon it in the manner directed in Chapter III of Title VIII of the Civil Code.

History. Civil Code, § 232; Acts 1871, No. 48, § 1 [232], p. 219; C. & M. Dig., § 512; Pope's Dig., § 549; A.S.A. 1947, § 31-122.

Publisher's Notes. Chapter III of Title VIII of the Civil Code, referred to in this section, means §§ 216-291 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Analysis

In general.
Execution of order.
Priority of liens.

In General.

The lien of an attachment springs by operation of law out of the act of the plaintiff in bringing his suit properly and of the officers in issuing and serving the process and, upon the performance of these acts, the lien, though inchoate, is perfect and substantial. Harrison v. Trader, 29 Ark. 85 (1874).

This lien is allowed for no purpose except for which the attachment is allowed; it creates no estate in the property attached, nor divests prior rights or equities therein. Tennant v. Watson, 58 Ark. 252, 24 S.W. 495 (1893).

Execution of Order.

A public declaration by an officer to whom a writ of attachment was directed, that he attached certain land as the property of the defendant named in the writ, made in the presence of a citizen of the county, was a good levy and created a lien on the land from the date of the attachment. Harrison v. Trader, 29 Ark. 85 (1874).

Except in cases of escape or of the removal of property after an order of attachment comes into his hands, a sheriff has no authority to execute process beyond his own county. Blevins v. State, 31 Ark. 53 (1876).

Attachment is lien from time it reaches constable's hands. Bergman v. Sells & Co., 39 Ark. 97 (1882); Merriman v. Sarlo, 63 Ark. 151, 37 S.W. 879 (1896); McKinney v. Blakely, 87 Ark. 405, 112 S.W. 976 (1908); Merchants & Farmers Bank v. Harris, 113 Ark. 100, 167 S.W. 706 (1914).

Property levied on and held by constable was not subject to seizure by sheriff without his consent. Derrick v. Cole, 60 Ark. 394, 30 S.W. 760 (1895).

Priority of Liens.

The lien of an attachment, when perfected by judgment sustaining it, is superior to a prior unrecorded mortgage upon the same property. Cross v. Fombey, 54 Ark. 179, 15 S.W. 461 (1891).

The lien of an attachment first placed in the sheriff's hands is superior to that of a subsequent attachment which is first lev-

ied. Simon v. Adler-Goldman Comm. Co., 56 Ark. 292, 19 S.W. 921 (1892).

Lien of attachment does not affect prior right of third persons. Tennant v. Watson, 58 Ark. 252, 24 S.W. 495 (1893).

If a writ is placed in the hands of the officer with directions not to serve unless some other creditor has attachment issued, the lien will not attach until the directions are countermanded; thus, so another writ given to the officer before such countermand will have priority. Florsheim Dry Goods Co. v. Taylor Comm. Co., 59 Ark. 307, 27 S.W. 79 (1894).

Where an attachment levied on real estate was subsequently sustained, but no sale under the attachment was made, the attachment will be considered abandoned, though the land was sold under execution based upon a money judgment, and a lien upon the property acquired after the levy of the attachment, but before rendition of the judgment upon which the execution was based, will take precedence over the execution sale. Snell v. Cummins, 67 Ark. 261, 54 S.W. 342 (1899).

When writs are handed to different officers, the one first levied on personal property gives prior lien. Lien of specific attachment is not prior to that of general attachment first levied. Arkadelphia Lumber Co. v. McNutt, 68 Ark. 417, 59 S.W. 761 (1900).

16-110-116. Property removed from county.

If, after an order of attachment has been placed in the hands of the sheriff or other officer, any property of the defendant is removed from the county, the sheriff may pursue and attach the property in another county, within twenty-four (24) hours after removal.

History. Civil Code, § 233; C. & M. Dig., § 513; Pope's Dig., § 550; A.S.A. 1947, § 31-123.

16-110-117. Bond of defendant for retention of property.

(a) The sheriff may deliver any attached property to the person in whose possession it was found upon the execution, in the presence of the sheriff, of a bond to the plaintiff, by the person, with one (1) or more sufficient sureties to the effect that the obligors are bound, in double the value of the property, that the defendant shall perform the judgment of the court in the action, or that the property or its value shall be forthcoming, and subject to the orders of court for the satisfaction of the judgment.

(b) For the purpose of taking this bond, the sheriff shall cause the property to be appraised by three (3) disinterested householders, to be selected and sworn by him or her to make fair appraisement on the order of attachment.

(c) In any proceeding on this bond, it shall not be a defense that the property was not subject to the attachment.

History. Civil Code, §§ 234-236; C. & M. Dig., §§ 514-516; Pope's Dig., §§ 551-553; A.S.A. 1947, §§ 31-124 — 31-126.

CASE NOTES

Analysis

Constitutionality.
Interpleader.
Replevin.
Satisfaction of judgment.
Sureties.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

Interpleader.

The execution by the person in whose possession attached property is found of the bond provided for in this section does not estop him from asserting his claim to the property by an interplea filed in apt time; further, he may prefer his claim without first surrendering the property to the officer holding the attachment. Applewhite v. Harrell Mill Co., 49 Ark. 279, 5 S.W. 292 (1887).

Bond of defendant does not release plaintiff's attachment lien but merely transfers custody of property from sheriff to defendant; thus, when court found property to belong to intervener, plaintiff's lien and the bond given therefor by defendant, were discharged. Rogers v. Reliable Feed Co., 169 Ark. 391, 275 S.W. 705 (1925).

Replevin.

The owner of personal property seized under attachment against the property of another may maintain replevin against the officer having possession of it. Willis v. Reinhardt, 52 Ark. 128, 12 S.W. 241 (1889).

Satisfaction of Judgment.

The obligors in a bond executed under this section have a right to retain the property until the court orders a sale of it to satisfy the judgment against the defendant; when such order is made, they may pay off the judgment or deliver the property or its value to the sheriff. Adams v. Jacoway, 34 Ark. 542 (1879).

A bond can only be satisfied by actual delivery or by bringing the property forward, pointing it out and tendering it to the officer; telling the officer where the property is and to go and get it is not sufficient. Chapline v. Robertson, 44 Ark. 202 (1884).

In an action upon a bond, the officer's return of the failure to deliver made upon the process is conclusive. Chapline v. Robertson, 44 Ark. 202 (1884).

The officer's return is not conclusive as to the third parties. Straub v. Wooten, 45 Ark. 112 (1885).

Judgment can only be rendered upon the bond given pursuant to this section when an assessment has been made of the value of the property retained by the principal, and such assessment is made only when the plaintiff demands it. Lowenstein v. McCadden, 54 Ark. 13, 14 S.W. 1095 (1890).

A bond given under this section conditioned that the person in possession, not the defendant, shall perform the judgment of the court in the action cannot be enforced as a statutory bond. Lowenstein v. McCadden, 54 Ark. 13, 14 S.W. 1095 (1890).

The measure of damages for failure to deliver is the value of the property which could have been delivered, and not the amount stated in the bond. Starnes v. Bender, 172 Ark. 788, 290 S.W. 357 (1927).

Sureties.

By executing the bond provided for by this section, the sureties become parties to the suit and subject to summary judgment in the action without notice. Fletcher v. Menken, 37 Ark. 206 (1881).

The sureties cannot set up the defense that the vendor had released his claim upon the chattel. Lott v. Porter, 97 Ark. 97, 133 S.W. 180 (1910).

Cited: McFerrin v. Clarksville Wood Indus., 217 Ark. 383, 230 S.W.2d 49 (1950); Stephens v. Walker, 743 F. Supp. 670 (W.D. Ark. 1990).

16-110-118. Motion to discharge before term of court.

(a) On reasonable notice to the plaintiff, the defendant may, at any time before the term next after the levy of the attachment, move the judge of the court in vacation to discharge the attachment, on the grounds of its having been issued contrary to the provisions of Article I of Chapter III of Title VIII of the Civil Code.

(b) The judge, on an inspection of the papers in the action or of the authenticated copies of them, shall have the same power of discharging the attachment by his or her written order, filed by the clerk, as he or she would have in court and shall have like power to permit amendments by the plaintiff.

History. Civil Code, § 285; C. & M. Dig., § 574; Pope's Dig., § 611; A.S.A. 1947, § 31-128.

Publisher's Notes. Article I of Chapter III of Title VIII of the Civil Code, referred to in this section means, §§ 216-258 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

16-110-119. Return of writ.

(a) The sheriff shall return, upon every order of attachment, what he or she has done under it.

(b)(1) The return must show the property attached, the time it was attached, and the disposition made of it.

(2) Where garnishees are summoned, their names and the time each was summoned must be stated.

(3) Where real property is attached, the sheriff shall describe it with sufficient certainty to identify it, and where he or she can do so, a reference to the deed or title under which the defendant holds it.

(c) The sheriff shall return with the order all bonds taken under it.

History. Civil Code, § 237; C. & M. Dig., § 517; Pope's Dig., § 554; A.S.A. 1947, § 31-127.

CASE NOTES

ANALYSIS

Amendment.
Control of property.

Effect.

Amendment.

Return may be amended to show prop-

erty levied on. Stout v. Brown, 64 Ark. 96, 40 S.W. 701 (1897).

Control of Property.

It is the duty of an officer who seizes property under attachment to retain control of it so that he may return it if required. Farris v. State, 33 Ark. 70 (1878).

Effect.

Sheriff is not authorized to act under writ after it is returned. Deutschman v. Byrne, 64 Ark. 111, 40 S.W. 780 (1897).

16-110-120. Removal of pending proceedings.

(a) In all actions in which attachments may be pending in the circuit court, held in any county, and in the inferior courts of the county, and which have been levied upon the same property, in whole or in part, it shall be the duty of the judge of the circuit court, or of the inferior court, upon the motion of either party in the action or actions, to make an order for the removal of the actions pending in the inferior court to the circuit court, where they shall be tried as if originally brought in the circuit court.

(b) In all actions which may be brought in the circuit court of this state, in which attachments may be pending, and which may be levied upon the same property, in whole or in part, the judges of the court where the actions are pending shall have power to make an order for the removal of the actions, or some of them, by change of venue, so as to have them all upon the same docket and under the control of the same court. The order of removal shall only be made upon petition filed, and in such cases as the judge shall be satisfied that the removal is necessary for the proper distribution of the attached property, and the adjustment of the rights of the parties to the actions. In making the order of removal, due regard shall be given to the convenience of the parties.

(c) The order of removal may be made in open court or by the judge of the courts in vacation. However, in either case, notice of the application shall be given to the opposite party, and affidavits may be read for and against such application.

(d)(1) Where the order of removal is made, it shall be the duty of the clerk of the circuit court and of the judges of the inferior courts immediately to remove the papers in the action, as directed by the order, and to file an authentic copy of the orders which have been made in the case or cases.

(2) If the order of removal is to another county, the clerk shall have the same fees now allowed for like services in other cases of change of venue, to be paid in advance by the applicant for the removal, to be taxed as costs, and finally paid out of the attached funds, or by such of the parties as the court shall order.

History. Civil Code, §§ 288-291; C. & M. Dig., §§ 575-578; Pope's Dig., §§ 612-615; A.S.A. 1947, §§ 31-129 — 31-132.

16-110-121. Collection, preservation, and sale of property.

(a)(1) The court shall make proper orders for the preservation and use of the property during the pending of the action and for paying into court or securing the debts and funds attached.

(2) It may direct a sale of the property where, by reason of its perishable nature or of the cost of keeping it, a sale would be for the benefit of the parties.

(A) In vacation, the sale may be ordered by the judge of the court.

(B) The sale shall be public, after advertisement, and made in such manner and upon such terms of credit, with security, as the court or judge, having regard to the probable duration of the action, may direct.

(C) The proceeds, if collected by the sheriff, together with all the money received by him or her from garnishees, shall be held and paid over by him or her under the same requirement and responsibilities of the sheriff and his or her sureties, as are provided in respect to money deposited in lieu of bail.

(D) But no sale shall be made in vacation without reasonable notice in writing to the opposite party or his or her attorney, if either of them reside in the county in which the cause is pending, of the time and place of the application therefor.

(b)(1) A judge of the circuit court in vacation of the circuit court shall have power to appoint a receiver to take charge of, collect, and account for all choses in action attached in any action, and said receiver shall have full power to collect the choses in action. He or she shall give bond and in all respects be subject to the same responsibilities as if appointed by the court in term time.

(2) The defendant or any claimant of any attached property may be required by the court or by the receiver to give information on oath respecting the property.

History. Civil Code, §§ 238, 239; Acts 1871, No. 48, § 1 [238, 239], p. 219; C. & M. Dig., §§ 518-522; Pope's Dig., §§ 555-559; A.S.A. 1947, §§ 31-133, 31-134.

CASE NOTES

Analysis

Power of court.
Sale of property.

Power of Court.

Attached property is within the control of the court and the plaintiff has no right to it as property; to remove and sell such property, with or without the consent of the attaching officer, is a contempt of court which a party commits at his peril. Atkins v. Swope, 38 Ark. 528 (1881).

The court has the inherent power to compel the plaintiff to account for attached property converted by him before giving judgment for him or allowing execution, or, if judgment is against plaintiff, may compel him to refund. Atkins v. Swope, 38 Ark. 528 (1881).

Sale of Property.

One who was not a party to an attachment suit until after an order of sale of the attached property was made in vacation and who had no notice of the application for the sale was not bound by such sale and could sue the purchaser for possession of the property. Klondike Lumber Co. v. Bender Wagon Co., 71 Ark. 339, 75 S.W. 855 (1903).

Title does not pass under an attachment sale until confirmation by the court. Kenady v. Gilkey, 81 Ark. 147, 98 S.W. 969 (1906).

Where the original seizure of property was unauthorized because the person having possession was not a party to the proceeding, the subsequent sale of the property under order of the court could be justified only by showing that the person's rights were adjudicated by the court before ordering the sale. Albie v. Jones, 82 Ark. 414, 102 S.W. 222 (1907).

16-110-122. Bond for restitution of property.

(a) If the defendant at any time before the judgment causes a bond to be executed to the plaintiff by one (1) or more sufficient sureties, to be approved by the sheriff, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged and restitution made of any property taken under it, or the proceeds thereof. However, the giving of this bond by the defendant shall not preclude his or her right to controvert the existence of the grounds stated by the plaintiff in his or her affidavit for the order of attachment.

(b) The bond may, in vacation, be executed in the presence of the sheriff having the order of attachment in his or her hands or, after the return of the order, before the clerk, with the same effect upon the attachment as if executed in court. The sureties, in either case, shall be approved by the officer.

History. Civil Code, §§ 242-243; Acts 1891, No. 33, § 1, p. 55; C. & M. Dig., §§ 525, 526; Pope's Dig., §§ 562, 563; A.S.A. 1947, §§ 31-136, 31-137.

CASE NOTES

Analysis

Constitutionality.
Applicability.
Discharge of attachment.
Discharge of bond.
Right to controvert grounds.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

Applicability.

In a suit in which no affidavit or bond was filed nor order of attachment issued, the bond of a surety under this section is unauthorized, answers no purpose, and gives the court no jurisdiction as to him. Williams v. Skipwith, 34 Ark. 529 (1879).

The provisions of this section apply in cases of attachment for rent and judgment may be rendered against the obligors of the discharging bond. Cole v. Tipton, 196 Ark. 1177, 114 S.W.2d 464 (1938).

Discharge of Attachment.

Upon the execution of a bond to discharge an attachment, the attachment becomes discharged, the grounds for attachment are no longer in controversy, and the obligor becomes bound absolutely to pay whatever judgment the plaintiff may recover in the action. Ferguson v. Glidewell, 48 Ark. 195, 2 S.W. 711 (1886).

Upon the dissolution of an attachment, the court properly refused judgment against the sureties. Ford v. Wilson, 172 Ark. 335, 288 S.W. 712 (1926).

The manner of dissolving attachment before trial is to execute the bond authorized by this section. Cole v. Tipton, 196 Ark. 1177, 114 S.W.2d 464 (1938).

Discharge of Bond.

Where attachment proceeding was filed by creditor and intervenor claimed title to the attached property by reason of a prior mortgage, and court found for intervenor and dismissed the attachment, the attachment bond was therefore discharged. McFerrin v. Clarksville Wood Indus., 217 Ark. 383, 230 S.W.2d 49 (1950).

Right to Controvert Grounds.

The fact that the defendant in an attachment suit executes a discharging bond does not preclude him from controverting the grounds of attachment and, consequently, no judgment can be entered against the surety of such bond where the attachment is not sustained. Burgener v. Spooner, 167 Ark. 316, 268 S.W. 6 (1925); Ford v. Wilson, 172 Ark. 335, 288 S.W. 712 (1926).

16-110-123. Appearance by execution of bond.

In an action where an attachment has been granted, the execution by or for the defendant of a bond whereby the attachment is discharged, or the possession of the attached property is obtained or retained by him or her, shall be an appearance of the defendant in the action.

History. Civil Code, § 793; C. & M. Dig., § 527; Pope's Dig., § 564; A.S.A. 1947, § 31-138.

CASE NOTES

Nonresidents.

Where, in an action against nonresidents, summons was issued and an attachment levied on property, defendants, by filing a forthcoming bond, were held to have entered their general appearance and waived objection to the court's jurisdiction or to any irregularity in the form of the writ of attachment. United States Fid. & Guar. Co. v. Walker, 190 Ark. 1, 76 S.W.2d 949 (1934).

16-110-124. Defendant's answer by affidavit.

(a) The defendant may file his or her affidavit denying all or any of the material statements of the affidavit upon which the attachment is issued. Thereupon, the attachment shall be considered as controverted and the affidavits of the plaintiff and defendant shall be regarded as the pleadings in the attachment and have no other effect.

(b) Where the attachment was obtained at the commencement of an action, the defendant may file his or her affidavit at such time after the levy of the attachment as is given by this code for filing his defense, after the service of the summons. The period may be extended by the court for sufficient cause.

History. Civil Code, § 280; C. & M. Dig., § 570; Pope's Dig., § 607; A.S.A. 1947, § 31-139.

Publisher's Notes. "This Code," referred to in this section, means the Code of Practice in Civil Cases of 1869. See parallel reference tables in the tables volume.

CASE NOTES

Analysis

Denial of allegations.
Motion to vacate.

Denial of Allegations.

Though the allegations of an affidavit for attachment must be denied under oath, this may be done by a verified answer, though the usual and better practice is to file a controverting affidavit. Ford v. Wilson, 172 Ark. 335, 288 S.W. 712 (1926).

Motion to Vacate.

A defendant in attachment may move to vacate the attachment although he disclaims any interest in the property. Salmon v. Mills, (8th Cir. 1892).

16-110-125. Proof by deposition or testimony.

Either party may take proof by deposition, to be read on the trial of the attachment, or, by permission of the court, the witnesses may be orally examined in court.

History. Civil Code, § 281; C. & M. Dig., § 571; Pope's Dig., § 608; A.S.A. 1947, § 31-140.

16-110-126. Testimony required for insufficient property.

(a) When it appears by the affidavit of the plaintiff or by the return of an officer to an order of attachment that no property is known to the plaintiff or the officer on which the order of attachment can be executed, or not enough to satisfy the plaintiff's claim, the defendant may be required by the court to attend before it and give information on oath respecting his or her property.

(b) Where it also appears by the affidavit of the plaintiff that some person other than the defendant has in his or her possession property of the defendant, or evidences of debt, the person may also be required by the court to attend before it and give information on oath respecting the property or evidences of debt.

History. Civil Code, § 241; C. & M. Dig., § 524; Pope's Dig., § 561; A.S.A. 1947, § 31-141.

16-110-127. Appearance by garnishee.

(a) Each garnishee summoned shall appear. The appearance may be in person or by affidavit of the garnishee filed in court disclosing truly the amount owing by him or her to the defendant, whether due or not, and the property of the defendant in the possession or under the control of the garnishee and, in the case of a corporation, any shares of stock therein held, by or for the benefit of the defendant, at or after the service of the order of attachment.

(b) Where a garnishee, or officer of a corporation summoned as a garnishee, appears in person, he or she may be examined on oath.

(1) If it is discovered on the examination that, at or after the service of the order of attachment upon him or her, he or she or the corporation

was possessed of any property of the defendant or was indebted to the defendant, the court may order the delivery of the property and the payment or security for the payment of the amount owing by the garnishee, into the court, or to such person as it may direct. That person shall give bond, with security for the property or amount owing, or the court may permit the garnishee to retain the property or the amount owing, upon the execution of a bond with one (1) or more sufficient sureties, to the effect that the amount shall be paid or the property shall be forthcoming, as the court may direct.

(2) Performance of these bonds may be summarily enforced by orders and proceedings as in cases of contempt.

(c) The court may, on motion of the plaintiff, compel the appearance in person, and examination, of any garnishee, or officer of a corporation summoned as a garnishee, by process, as in cases of contempt. Where a garnishee makes a default by not appearing, the court may hear proof of any debt or property owing or held by him or her to, or for, the defendant and make such order in relation thereto, as if what is so proved had appeared on the examination of the garnishee.

History. Civil Code, §§ 245-247; C. & M. Dig., §§ 529-531; Pope's Dig., §§ 566-568; A.S.A. 1947, §§ 31-143 — 31-145.

CASE NOTES

Analysis

Burden of proof.
Failure to appear.
Jurisdiction.

Burden of Proof.

The burden of proof that a purchase of debts made on the same day of service of a garnishment was before the service is upon the purchaser. Bergman v. Sells & Co., 39 Ark. 97 (1882).

Failure to Appear.

Where a garnishee does not appear in person, the plaintiff is not entitled to an order that the garnishee shall deliver the property of the defendant or that he shall pay the money owing the defendant into court; rather, plaintiff must compel appearance under subsection (c) or pursue his remedy under § 16-110-133. Allen-West Comm'n Co. v. Grumbles, 129 F. 287 (8th Cir. 1904).

Jurisdiction.

The jurisdiction of the circuit court over the funds in the hands of the garnishee does not depend upon the amount of his indebtedness to the debtor. Moore v. Kelley, 47 Ark. 219, 1 S.W. 97 (1886).

16-110-128. Time for disposition of attachment.

(a) An attachment obtained at the commencement of an action shall be sustained or discharged at the time that judgment is rendered in the action unless for sufficient cause the court extends the time of deciding upon it.

(b) An attachment obtained after the commencement of an action shall not be sustained until the defendant has had the time for controverting it as provided in Chapter III of Title VIII of the Civil Code.

History. Civil Code, § 276; C. & M. Dig., § 566; Pope's Dig., § 603; A.S.A. 1947, § 31-148.

Publisher's Notes. Chapter III of Title VIII of the Civil Code, referred to in this section, means §§ 216-291 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

CASE NOTES

Trial of Issues.

The court should try the issue as to grounds of attachment. Von Berg v. Goodman, 85 Ark. 605, 109 S.W. 1006 (1908).

16-110-129. Discharge of garnishee.

(a) The garnishee may pay the money owing to the defendant by him or her to the sheriff having in his or her hands the order of attachment or into the court.

(b) He or she shall be discharged from liability to the defendant for any money so paid, not exceeding the plaintiff's claim.

(c)(1) He or she shall not be subjected to costs beyond those caused by his or her resistance of the claim against him or her.

(2) If he or she discloses the property of the defendant in his or her hands or the true amount owing by him or her and delivers or pays the amount owing according to the order of the court, he or she shall be allowed his or her costs.

History. Civil Code, § 244; C. & M. Dig., § 528; Pope's Dig., § 565; A.S.A. 1947, § 31-146.

CASE NOTES

Construction.

There is nothing in this section to except it from the general rule that statutes regulating costs are strictly construed against the party claiming them. W.A. Krueger Co. v. Saint Bernard's Regional Medical Ctr., 267 Ark. 180, 590 S.W.2d 1 (1979).

Cited: Saunders v. Kleier, 296 Ark. 25, 751 S.W.2d 343 (1988).

16-110-130. Motion to discharge.

(a) At any time before the attachment is sustained, the defendant, upon reasonable notice to the plaintiff or the plaintiff's attorney, may move the court to discharge the attachment, the hearing of which may be postponed by the court, upon sufficient cause, from time to time.

(b) Upon the hearing, if the court is of the opinion that the attachment was obtained without sufficient cause or that the grounds of attachment being controverted are not sustained, the attachment shall be discharged.

History. Civil Code, § 282; C. & M. Dig., § 572; Pope's Dig., § 609; A.S.A. 1947, § 31-149.

CASE NOTES

Analysis

Constitutionality.
In general.
Grounds sufficient.
Judgment.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

The lack of prompt notice to the debtor of a prejudgment attachment and of possible state or federal exemptions and the lack of a prompt hearing at which the debtor can claim exemptions leaves the prejudgment attachment provisions inadequate to prevent an erroneous deprivation of property in violation of due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

In General.

This is a procedural section that provides for a court hearing when the attachment has been issued by the clerk of the court; the court may discharge the attachment issued by the clerk if it was obtained without sufficient cause, which means without a statutory ground, or if the existence of the asserted ground is successfully controverted by evidence presented to the court upon the motion to discharge the attachment. Sun Marine Terms. v. Tosco Corp., 287 Ark. 233, 697 S.W.2d 901 (1985).

Grounds Sufficient.

Where the pleading contained an allegation that the value of the security was diminishing and that the debtor was in the process of selling or disposing of the collateral and that the collateral was in danger of being sold, concealed, or moved from the premises in derogation of the rights and interest of the secured party, without the proceeds being applied to the debt and contrary to the terms of the security agreement, and where it was further alleged that if the property were not attached it would greatly diminish, the allegations made by the secured party stated a ground for attachment. Hackworth v. First Nat'l Bank, 265 Ark. 668, 580 S.W.2d 465 (1979).

Judgment.

Upon the discharge of an attachment, the defendant should have judgment for the return of the attached property. Jackman v. Anderson, 33 Ark. 414 (1878).

16-110-131. Judgment for defendant.

(a) If judgment is rendered in the action for the defendant, the attachment shall be discharged, and the property attached or its proceeds shall be returned to him or her.

(b) In all actions of attachment in which the defendant shall recover for the discharge of the attachment, the court or jury trying the attachment shall assess the damages sustained by the defendant by reason of the attachment, and the court shall render judgment against the plaintiff and his or her sureties in the attachment bond for the amount of the damages and cost of the attachment.

History. Civil Code, § 249; Acts 1875 (Adj. Sess.), No. 6, § 1, p. 7; C. & M. Dig., §§ 533, 534; Pope's Dig., §§ 570, 571; A.S.A. 1947, §§ 31-151, 31-152.

CASE NOTES

Analysis

Constitutionality.
In general.
Construction.
Applicability.
Costs.
Damages.
—Assessment of damages.
—Measure of damages.
Liability of plaintiffs.
Parties.

Constitutionality.

Absent a judge's participation or supervision, there is a significant risk that a writ of attachment will be issued even though the statutory attachment procedures have not been met; this expressly overrules Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), which held that the issue of prejudgment attachments by the clerk met the "safeguards test" and satisfied due process. McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

In General.

Upon discharge of an attachment, defendant is entitled to judgment for the value of the property sold under the writ of attachment. Hines v. Stephens, 90 Ark. 518, 119 S.W. 664 (1909).

The defendant might elect to proceed under subsection (a) or subsection (b) of this section, but cannot avail himself of the provisions of both. Harrison v. Fulk, 128 Ark. 229, 193 S.W. 532 (1917).

Construction.

This section is mandatory and requires all issues to be disposed of in one suit. Davidson v. Mayhue, 120 Ark. 344, 179 S.W. 371 (1915).

Applicability.

Where, because of lack of jurisdiction, no issues were determined in the justice court, defendant's right to bring subsequent suit for damages resulting from alleged wrongful attachment would not be controlled by this section. Smyrna Baptist Church v. Burbridge, 205 Ark. 108, 167 S.W.2d 501 (1943).

Costs.

Judgment for the defendant in an action when the debt is controverted carries with it the costs of an attachment ancillary to the suit. Malpas v. Lowenstine, 46 Ark. 552 (1885) (decision under prior law).

Damages.

Owner of property is not estopped to claim damages for wrongful attachment by consenting to application of proceeds. Walker v. Fetzer, 62 Ark. 135, 34 S.W. 536 (1896).

—Assessment of Damages.

There should be no assessment of damages upon the discharge of an attachment before the trial or final disposition of the case. Kurtz v. Dunn, 36 Ark. 648 (1880).

In assessing damages for a wrongful attachment, evidence is admissible to prove the value before the seizure and the extent of its depreciation at time of restoration, and it may not be shown that, had the levy not been made, the debtor would have sold the property at a reduced price. Estes v. Chesney, 54 Ark. 463, 16 S.W. 267 (1891).

When the attached property has been sold, the court should not order a return of the property but, rather, should assess damages to cover the value at time of seizure and interest to day of trial. Norman v. Fife, 61 Ark. 33, 31 S.W. 740 (1895).

When the jury disregarded the evidence and instructions of the court and returned a verdict for excessive damages, the judgment must be reduced. Hines v. Stephens, 90 Ark. 518, 119 S.W. 664 (1909).

It is error, on dissolving an attachment, to refuse to permit the jury to assess damages where the evidence tends to show that defendant has sustained damages by reason of the attachment. Rodgers v. Cades, 103 Ark. 187, 146 S.W. 507 (1912).

Damages should be assessed by the jury. Bank & Trust Co. v. Stafford & Wimmer, 129 Ark. 172, 195 S.W. 397 (1917).

—Measure of Damages.

Damages are not recoverable for injury to credit and loss of prospective profits in business. Holliday v. Cohen, 34 Ark. 707 (1879).

Upon the discharge of an attachment, only such damages can be recovered by the defendant as are actual and the natural and direct consequences of the attach-

ment; these damages do not include attorney's fees. Patton v. Garrett, 37 Ark. 605 (1881).

Upon a showing that the attachment was wrongfully sued out, the measure of damages is the actual loss from being deprived of the use of the property, the injury to it, and the expenses incurred in defending the attachment; the value of the property when attached is not the measure unless the property is entirely lost. Boatwright v. Stewart, 37 Ark. 614 (1881).

When goods are seized and sold under a wrongful attachment which is subsequently dissolved, their value at the time of seizure with interest to the date of trial, less the sum for which they sold, will constitute the measure of damage. Blass v. Lee, 55 Ark. 329, 18 S.W. 186 (1892); Norman v. Fife, 61 Ark. 33, 31 S.W. 740 (1895).

When, upon the dissolution of an attachment, defendant is awarded damages less than the amount he is adjudged to owe the plaintiff, the smaller claim should set off against the larger and judgment rendered for the balance in favor of plaintiff. Popplewell v. Hill, 55 Ark. 622, 18 S.W. 1054 (1892).

Where property was sold and proceeds applied to payment of plaintiff's judgment, the amount so applied should be deducted from the damages recoverable by defendant on dissolution of attachment. Scanlan v. Guiling, 63 Ark. 540, 39 S.W. 713 (1897).

Liability of Plaintiffs.

Plaintiff in attachment is not liable for injury resulting from the sale of defendant's property under execution, although the issue of the execution may have been precipitated by the attachment. Goodbar v. Lindsley, 51 Ark. 380, 11 S.W. 577 (1888).

The attempted levy upon accounts by seizing the books containing them does not render the plaintiff liable for losses incurred in the collection thereof through a supposed inability to collect the accounts owing to such levy. Goodbar v. Lindsley, 51 Ark. 380, 11 S.W. 577 (1888).

When the attachment is wrongfully sued out, the plaintiff and his sureties are liable for any waste occurring to the attached property in the hands of the officer levying the attachment. Boatwright v. Stewart, 37 Ark. 614 (1881).

The personal expenses of a defendant in attachment, incurred in prosecuting his suit for injury caused by the attachment, cannot be assessed against the plaintiff and his bondsmen on discharge of the attachment. Goodbar v. Lindsley, 51 Ark. 380, 11 S.W. 577 (1888).

Parties.

In proceedings under this section no service of notice or process on the sureties is necessary. Fletcher v. Menken, 37 Ark. 206 (1881).

Parties executing a bond of indemnity to induce a levy on certain goods under attachment become participants in the trespass where the goods are wrongfully attached. Rice v. Wood, 61 Ark. 442, 33 S.W. 636 (1896).

Cited: Lide v. Carothers, 570 F.2d 253 (8th Cir. 1978); Stephens v. Walker, 743 F. Supp. 670 (W.D. Ark. 1990).

16-110-132. Judgment in favor of plaintiff.

(a) If judgment is rendered in favor of the plaintiff and no affidavit or answer verified by oath by the defendant filed denying the statements of the affidavit upon which the attachment was issued, or motion made to discharge it, the court shall sustain the attachment.

(b) Upon an attachment being sustained, the property attached, its proceeds, or the securities taken upon the attachment, shall, by appropriate orders, be applied in satisfaction of the judgment.

(c)(1) If judgment is rendered for the plaintiff, the court shall apply in satisfaction thereof:

(A) The moneys arising from the sales of perishable property;

(B) The proceeds of the debts and funds attached in the hands of the garnishees.

(2) If these are not sufficient to satisfy the plaintiff's claim, the court shall order a sale, by the sheriff, of any other attached property which may be under its control, in the following order:

(A) Personal property;

(B) Real property, or so much of it as may be necessary to satisfy the plaintiff's claim.

History. Civil Code, §§ 250, 278, 279; C. & M. Dig., §§ 535, 568, 569; Pope's Dig., §§ 572, 605, 606; A.S.A. 1947, §§ 31-153 — 31-155.

CASE NOTES

Analysis

Attachments sustained.
Denial of allegations.
Sale of property.

Attachments Sustained.

The court is required to sustain an attachment whenever the defendant fails to file either an affidavit denying the grounds of attachment or a motion to discharge the attachment. Weibel v. Beakley, 90 Ark. 454, 119 S.W. 657 (1909).

Judgment sustaining attachment was correct where no controverting affidavit was filed, verified answer did not controvert alleged ground for attachment, and parties stipulated that only issue to be tried was whether attachment was lawful. Cue Ball Co. v. East Ark. Lumber Co., 194 Ark. 251, 106 S.W.2d 594 (1937).

Denial of Allegations.

While allegations of affidavit must be denied under oath to make an issue as to the attachment, this may be done by a verified answer as well as by a controverting affidavit. Ford v. Wilson, 172 Ark. 335, 288 S.W. 712 (1926).

Sale of Property.

A sale of lands under a junior attachment does not release the lien of a prior attachment and the money arising from such sale is not to be applied in payment of the prior attachment. Hanauer & Co. v. Casey, 26 Ark. 352 (1870).

In attachment suits where there is only constructive service on the defendant, the court acquires no jurisdiction over any property not attached and a sale of any other property under a personal judgment and execution rendered in the case is void. Wilson v. Spring, 38 Ark. 181 (1881).

When the defendant has been constructively summoned and has not appeared in the actions, his land, which has been attached and ordered to be sold, cannot be sold until the statutory bond has been executed and filed. Bush v. Visant, 40 Ark. 124 (1882); Visart v. Bush, 46 Ark. 153 (1885).

A judgment sustaining a general attachment and ordering the property sold does not debar the debtor from asserting his right of homestead in the property at any time before sale. Robinson v. Swearingen, 55 Ark. 55, 17 S.W. 365 (1891).

A debtor cannot claim exemption in the proceeds of personal property sold under attachment where he had an opportunity and neglected to claim his exemptions in specific articles before sale. Surratt v. Young, 55 Ark. 447, 18 S.W. 539 (1892).

16-110-133. Judgment against garnishee.

(a) Upon the service of a summons upon any garnishee or after his or her failure to make a disclosure satisfactory to the plaintiff, the latter may proceed in an action against him or her by filing a complaint verified as in other cases and causing a summons to be issued upon it.

(b) Thereupon, the proceeding may be had as in other actions and judgment may be rendered in favor of the plaintiff to subject the property of the defendant into the hands of the garnishee, or for what shall appear to be owing to the defendant by the garnishee.

(c) The judgment may be enforced by execution or other proper means.

History. Civil Code, § 248; C. & M. Dig., § 532; Pope's Dig., § 569; A.S.A. 1947, § 31-147.

CASE NOTES

Analysis

In general.
Actions against garnishees.
Scope of proceedings.

In General.

The effect of a garnishment is to fasten the indebtedness to the defendant in the garnishee's hand and confer on the plaintiff the same right to collect it that the defendant had before garnishment, subject to all defenses that the garnishee would have had against the defendant. Lewis v. Faul, 29 Ark. 470 (1874); Giles v. Hicks, 45 Ark. 271 (1885); Saint Louis, I.M. & S. Ry. v. Richter, 48 Ark. 349, 3 S.W. 56 (1886); Penyan v. Berry, 52 Ark. 130, 12 S.W. 241 (1889).

Actions Against Garnishees.

No judgment can be rendered against a garnishee in an attachment proceedings if he fails to answer or answers unsatisfactorily; the plaintiff's remedy is by an action against him. Lewis v. Faul, 29 Ark. 470 (1874); Giles v. Hicks, 45 Ark. 271 (1885); Saint Louis, I.M. & S. Ry. v. Richter, 48 Ark. 349, 3 S.W. 56 (1886); Penyan v. Berry, 52 Ark. 130, 12 S.W. 241 (1889).

Where the garnishee does not appear in person as required by § 16-110-127, in the absence of a proceeding under § 16-110-127 to compel appearance, the plaintiff is not entitled to an order against the garnishee; rather, his remedy is under this section. Allen-West Comm'n Co. v. Grumbles, 129 F. 287 (8th Cir. 1904).

An action cannot be maintained against a wife as garnishee by a creditor of her husband. Allen-West Comm'n Co. v. Grumbles, 161 F. 461 (8th Cir. 1908).

Scope of Proceedings.

A garnishment proceeding cannot settle disputes between the defendant and the garnishees; that must be done in a direct suit. Moore v. Kelley, 47 Ark. 219, 1 S.W. 97 (1886); Penyan v. Berry, 52 Ark. 130, 12 S.W. 241 (1889).

Ancillary garnishment suit should not be tried before judgement recovered in attachment, nor should the attachment and garnishment suits should be consolidated. Adler-Goldman Comm'n Co. v. Bloom, 62 Ark. 616, 37 S.W. 305 (1896).

Cited: May v. Bob Hankins Distrib. Co., 301 Ark. 494, 785 S.W.2d 23 (1990).

16-110-134. Intervention before sale.

(a) Before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or of any attached debt, any person may present his or her complaint verified by oath to the court. This complaint shall dispute the validity of the attachment, or state a claim to the property or an interest in, or lien on it under any other attachment, or otherwise, and set forth the facts upon which the claim is founded, and his or her claim shall be investigated.

(b) A nonresident claimant shall, in such cases, give security for costs.

(c) The court may hear the proof, may order a reference to a commissioner, or may impanel a jury to inquire into the facts.

(d) If it is found that the claimant has a title to, a lien on, or any interest in the property, the court shall make such order as may be necessary to protect his or her rights.

(e) The costs of this proceeding shall be paid by either party, at the discretion of the court.

(f) Where several attachments are executed on the same property, the court, on the motion of any one (1) of the attaching plaintiffs, may order a reference to a commissioner, to ascertain and report the amounts and priorities of the several attachments.

History. Civil Code, § 257; C. & M. Dig., §§ 544-547; Pope's Dig., §§ 581-584; A.S.A. 1947, § 31-157.

CASE NOTES

Analysis

Appeals.
Evidence.
Interveners.
—Junior creditors.
Pleadings.
Scope of proceedings.
Standing.

Appeals.

Judgment dismissing petition of intervener is appealable. Citizens Bank v. Commercial Nat'l Bank, 107 Ark. 142, 155 S.W. 102 (1913).

Evidence.

Where claimants alleged in their interplea that the mortgaged property had been levied on by attachment in a proceeding in which the interplea was filed and they admitted in the progress of the trial that the attached property and that which they claimed was the same, it was held on the trial of the interplea that it was not necessary for the attaching creditor to offer the record of the attachment in evidence in order to show that he had secured a lien on the property. Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., (8th Cir. 1898).

Interveners.

Where a sheriff has seized property on an attachment exceeding in amount the sum due under the writ and prevented a United States marshal from taking possession under a subsequent writ, the creditor who sued in the federal court could, after judgment sustaining his attachment therein, intervene in the suit in which the sheriff took possession and have distribution according to order of priority of the writs. Goodbar v. Brooks, 57 Ark. 450, 22 S.W. 96 (1893); Rosewater v. Schwab Clothing Co., 58 Ark. 446, 25 S.W. 73 (1894).

Intervener is not estopped by judgment discharging attachment. De Loach Mill Mfg. Co. v. Little Rock Mill & Elevator Co., 65 Ark. 467, 47 S.W. 118 (1898).

After a court ordered a garnishee to pay over an amount of money to be determined by subsequent events but before actual payment by the garnishee, another party could intervene in order to assert a claim to the fund in question. Lawrence v. Ford Motor Credit Co., 247 Ark. 1125, 449 S.W.2d 695 (1970).

Judgment creditor had standing in its own right to challenge the constitutionality of prejudgment attachments made by another creditor of the same debtor. Springdale Farms, Inc. v. McIlroy Bank & Trust, 281 Ark. 371, 663 S.W.2d 936 (1984), overruled on other grounds, McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

—Junior Creditors.

A junior attaching creditor may intervene in a prior attachment suit and contest his rights with the plaintiff in that suit; the contest of the intervener cannot be in lieu of the defendants, and he cannot take any advantage of amendable defects in the proceedings nor defend the suit and grounds of attachment, but may object to jurisdictional and other unamendable defects in the proceedings. Sannoner v. Jacobson, 47 Ark. 31, 14 S.W. 458 (1885); Caruth-Byrnes Hdwe. Co. v. Deere, Mansur & Co., 53 Ark. 140, 13 S.W. 517 (1890); Rice v. Dorrian, 57 Ark. 541, 22 S.W. 213 (1893).

A junior attaching creditor may set aside a prior attachment when the suit was not authorized by the plaintiff, and

only ratified after his attachment was levied. Caruth-Byrnes Hdwe. Co. v. Deere, Mansur & Co., 53 Ark. 140, 13 S.W. 517 (1890); Davis v. H.B. Claflin Co., 63 Ark. 157, 38 S.W. 662, 38 S.W. 1117, 41 S.W. 996 (1893).

A junior attacher can, for the purpose of protecting his rights in the property attached, dispute the validity of a prior attachment and establish the rights of his own to precedence by showing that the first exists without authority or is not allowed by law. Rice v. Dorrian, 57 Ark. 541, 22 S.W. 213 (1893).

A junior creditor cannot take advantage of irregularities in the proceedings in a prior attachment though constituting good grounds for setting aside the attachment. Glaser v. First Nat'l Bank, 62 Ark. 171, 34 S.W. 1061 (1896).

Pleadings.

The interplea filed under this section must be treated as other pleadings and answer filed thereto as a complaint. Rosewater v. Schwab Clothing Co., 58 Ark. 446, 25 S.W. 73 (1894).

The unverified petition of intervener is good after judgment. Burke v. Sharpe, 88 Ark. 433, 115 S.W. 145 (1908).

Written interplea may be waived by trying issues. Wray Bros. v. H.A. White Auto Co., 155 Ark. 153, 244 S.W. 18 (1922).

Scope of Proceedings.

This section does not allow an intervener to contest the grounds of the attachment. Rice v. Adler-Goldman Comm'n Co., 71 F. 151 (8th Cir. 1895).

The proceeding authorized by this section is one to determine the ownership of the property in the hands of the court and, in such a proceeding, the interpleader may not recover from the plaintiff the value of the attached property. Swift & Co. v. Russell, 97 F. 443 (8th Cir. 1899).

The proceedings under this section contemplate only a trial of the right of property; damages for the detention of the property can only be recovered in a separate action. Jefferson v. Dunavant, 53 Ark. 133, 13 S.W. 701 (1890).

There is no authority to deliver possession to the intervener under this section. Fitzhugh v. Hackley, 70 Ark. 54, 66 S.W. 146 (1902).

Standing.

Under subsection (a) of this section, "any person" is permitted to present his complaint to the court, including a person who has assigned the funds that are the subject of a garnishment. Watkins v. Hadamek, 48 Ark. App. 78, 892 S.W.2d 515 (1994).

Cited: Burbridge Found., Inc. v. Reinholdt & Gardner, 363 F. Supp. 445 (W.D. Ark. 1973); Turner v. Farnam, 82 Ark. App. 489, 120 S.W.3d 616 (2003).

16-110-135. Repossession of property by sheriff.

(a) The court may order the sheriff to repossess himself or herself, for the purpose of selling it, any of the attached property which may have passed out of his or her hands, without having been sold or converted into money.

(b) The sheriff shall, under the order, have the same power to take the property as upon an order of the attachment.

History. Civil Code, § 256; C. & M. Dig., § 541; Pope's Dig., § 578; A.S.A. 1947, § 31-156.

16-110-136. Sale of property.

(a) The court may compel the delivery to the sheriff, for sale, of any of the attached property for which a bond may have been given and may proceed summarily on the bond to enforce the delivery of the property, or the payment of such sums as may be due upon the bond, by rules and attachments as in cases of contempt.

(b) The sales shall be public, upon such notice, and at such time and place, as the court may direct.

(1) When credits are given, bonds, with security, shall be required and the credit shall not be longer than three (3) months for personal property, and not less than three (3) nor more than twelve (12) months for real property, or on installments equivalent to not more than twelve (12) months' credit on the whole. Upon real property, a lien shall be retained.

(2) The sales shall be subject to the confirmation of the court.

(c) Any surplus of the attached property or its proceeds shall be returned to the defendant.

(d) No order for the sale of real property attached in virtue of the provisions of Article I of Chapter III of Title VIII of the Civil Code shall be made in any action in which the defendant has not appeared or been actually summoned until there has been filed an affidavit of the plaintiff, or of his or her agent or attorney, to the effect that the defendant has no personal property or not enough to satisfy the claim of the plaintiff, in this state, known to the affiant.

History. Civil Code, §§ 251-254; C. & M. Dig., §§ 536-539; Pope's Dig., §§ 573-576; A.S.A. 1947, §§ 31-158 — 31-161.

Publisher's Notes. Article I of Chapter III of Title VIII of the Civil Code, referred to in this section, means §§ 216-258 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

CASE NOTES

Analysis

Affidavit.
Confirmation by court.
Failure to sell.
Redemption.

Affidavit.

The affidavit required to obtain sale of lands was not required when a constable levied an attachment on the land and certified that the defendant had no personal property. Webster v. Daniel, 47 Ark. 131, 14 S.W. 550 (1886).

Confirmation by Court.

The sale of attached property is not complete till confirmed by the court; an action to recover the purchase money before such confirmation is premature and cannot be maintained. Freeman v. Watkins, 52 Ark. 446, 13 S.W. 79 (1889); Kenady v. Gilkey, 81 Ark. 147, 98 S.W. 969 (1906); Henry Quellmalz Lumber & Mfg. Co. v. Day, 132 Ark. 469, 201 S.W. 125 (1918).

After confirmation by the court, a sale will not be set aside for irregularities as to notice. Stout v. Brown, 64 Ark. 96, 40 S.W. 701 (1897).

Failure to Sell.

No liability accrues for a failure of a sheriff to sell attached property condemned by order of court to be sold until legal demand has been made for the execution of the order. State ex rel. Cotton v. Atkinson, 53 Ark. 98, 13 S.W. 415 (1890).

Lien is abandoned if no sale is made. Snell v. Cummins, 67 Ark. 261, 54 S.W. 342 (1899).

Redemption.

A sale under a judgment or order of a court of law in a suit in which an attachment issues is not a judicial sale and the right of redemption exists for one year, as in cases of sales under execution. Beard v. Wilson, 52 Ark. 290, 12 S.W. 567 (1889).

16-110-137. Judgment on bond.

(a) If the plaintiff shall recover against the defendant, and the attachment shall have been discharged upon the execution of a bond, as provided by § 16-110-122(a), then the court shall render judgment against the defendant and his or her sureties in the bond for the amount recovered and the costs of the suit.

(b) If the defendant shall have given bond for the retention of the property attached, as provided by § 16-110-117(a), and the attachment shall be sustained, the court or jury, in addition to finding the amount of debt or damages due to the plaintiff, shall, upon demand of the plaintiff, also assess the value of the property attached. The court shall, in addition to judgment against the defendant for the amount found due to the plaintiff, and costs, render further judgment, that in case the property shall not be delivered up to the proper officer to be sold, and the officer shall not be able to make the judgment out of the property of the defendant, execution shall then issue against the property of the sureties for so much of the judgment as shall not exceed the value of the property, which execution shall be enforced as in other cases.

History. Acts 1875 (Adj. Sess.), No. 6, § 1, p. 7; C. & M. Dig., §§ 542, 543; Pope's Dig., §§ 579, 580; A.S.A. 1947, §§ 31-162, 31-163.

CASE NOTES

Analysis

Discharging bonds.
Forthcoming bonds.

Discharging Bonds.

A plaintiff in attachment may recover judgment against the sureties in a discharging bond upon the trial of the main cause. Brugman v. McGuire, 32 Ark. 733 (1878).

Upon execution of discharging bond, attachment becomes discharged, the grounds of attachment are no longer in controversy and obligors on bond become bound absolutely to pay whatever judgment plaintiff may recover. Ferguson v. Glidewell, 48 Ark. 195, 2 S.W. 711 (1886).

There can be no judgment on a discharging bond unless the attachment is sustained. Burgener v. Spooner, 167 Ark. 316, 268 S.W. 6 (1925).

Where payee's son instituted suit upon a note before a justice of the peace, the note was filed, and the bond for attachment showed that the son was acting as agent for the payee who was the real party in interest, the fact that the suit was instituted on behalf of the payee could be made to appear by amendment, though the cause had been erroneously docketed, and judgment in favor of payee was proper. Truitt v. Baker, 197 Ark. 330, 122 S.W.2d 467 (1938).

Where attachment proceeding was filed by creditor and intervenor claimed title to the attached property by reason of a prior mortgage, and court found for intervenor and dismissed the attachment, the attachment bond discharged. McFerrin v. Clarksville Wood Indus., 217 Ark. 383, 230 S.W.2d 49 (1950).

Forthcoming Bonds.

The judgment provided for in subsection (b) of this section must be for the value of the property as found by the court or jury trying the case and not the value fixed by the appraisers for taking the bond. Creanor v. Creanor, 36 Ark. 91 (1880); Fletcher v. Menken, 37 Ark. 206 (1881).

In action against the principal and sureties on a note, when the principal executes a delivery bond with sureties, the latter are, as between them and the sureties on the note, primarily liable to the extent of the value of the property attached for the satisfaction of the debt. Fletcher v. Menken, 37 Ark. 206 (1881).

The remedy provided in subsection (b) of this section is cumulative. Chapline v. Robertson, 44 Ark. 202 (1884).

Judgment on bond cannot be rendered unless, on demand of plaintiff, assessment has been made of value of property retained by defendant. Lowenstein v. McCadden, 54 Ark. 13, 14 S.W. 1095 (1890).

Sureties on a forthcoming bond in attachment proceedings conditioned for the return of the property or payment of its value on their failure to return the property within the time specified in the bond are not entitled to notice before judgment is rendered against them on the bond. Dent v. Farmers & Merchants Bank, 162 Ark. 325, 258 S.W. 322 (1925).

Where will provided for appointment of widow as executrix without giving bond and without making reports and settlements, remainderman in the estate has no right to require a bond and an accounting from widow who was life tenant without alleging and proving mismanagement, waste, or conversion. Dillen v. Fancher, 197 Ark. 995, 125 S.W.2d 110 (1939).

Cited: Ferguson v. Glidewell, 48 Ark. 195, 2 S.W. 711 (1886).

16-110-138. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section was deemed superseded by the Arkansas Rules of Appellate Procedure [now the Rules of Appellate Procedure — Civil and Rules of Apellate Procedure — Criminal] and the Arkansas Rules for Inferior Courts. This section was derived from Civil Code, § 283; C. & M. Dig., § 573; Pope's Dig., § 610; A.S.A. 1947, § 31-165.

16-110-139. Powers of court.

The court may, from time to time, make and enforce proper orders respecting the property, sales, and the confirmation thereof, and the application and payment of the moneys collected.

History. Civil Code, § 255; C. & M. Dig., § 540; Pope's Dig., § 577; A.S.A. 1947, § 31-164.

Subchapter 2 — Attachment Against Specific Property

SECTION.
16-110-201. Other procedures applicable.
16-110-202. Enforcement of mortgage, lien, etc., of personal property.
16-110-203. Action by vendor to vacate fraudulent purchase.
16-110-204. Grant of attachments generally.
16-110-205. Security and bond.
16-110-206. Order of attachment.
16-110-207. Disposition of attached property.
16-110-208. Conditions of bond to obtain discharge.
16-110-209. Removal of property from county.
16-110-210. Concealment of property.
16-110-211. Enforcement of bonds.

Cross References. Action by vendor for recovery, § 16-118-104.

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1877, No. 49, § 6: effective on passage.

16-110-201. Other procedures applicable.

The provisions of Article I of Chapter III of Title VIII of the Civil Code not inconsistent with this subchapter may be applied, so far as shall be proper, to regulate the proceedings in cases of attachment against specific property.

History. Civil Code, § 275; C. & M. Dig., § 565; Pope's Dig., § 602; A.S.A. 1947, § 31-312.

Publisher's Notes. Article I of Chapter III of Title VIII of the Civil Code, referred to in this section, means §§ 216-258 of the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

CASE NOTES

Cited: Sellers v. Bowie, 183 Ark. 726, 38 S.W.2d 560 (1931).

16-110-202. Enforcement of mortgage, lien, etc., of personal property.

In an action to enforce a mortgage of, or lien upon, personal property; for the recovery, partition, or sale of the property; or by a plaintiff having a future estate or interest therein, for the security of his or her rights, where it satisfactorily appears by the complaint, verified on oath or by affidavits or the proofs in the cause, that the plaintiff has a just claim and that the property is about to be sold, concealed, or removed from the state, or where the plaintiff states on oath that he or she has reasonable cause to believe and does believe that, unless prevented by the court, the property will be sold, concealed, or removed from the state, an attachment may be granted against the property.

History. Civil Code, § 264; C. & M. Dig., § 554; Pope's Dig., § 591; A.S.A. 1947, § 31-301.

CASE NOTES

Jurisdiction.

Justices of the peace have no jurisdiction under this section. Lemay v. Williams, 32 Ark. 166; Arkadelphia Lumber Co. v. McNutt, 68 Ark. 417, 59 S.W. 761 (1900).

16-110-203. Action by vendor to vacate fraudulent purchase.

In an action by a vendor of property fraudulently purchased to vacate the contract and have a restoration of the property or compensation therefor, where the complaint shows the fraudulent purchase of property and the amount of the plaintiff's claim, and is verified by his oath, an attachment against the property may be granted.

History. Civil Code, § 265; C. & M. Dig., § 555; Pope's Dig., § 592; A.S.A. 1947, § 31-302.

16-110-204. Grant of attachments generally.

The attachments in the cases mentioned in §§ 16-110-202 and 16-110-203 may be granted by the court in which the action is brought, by the judge or clerk thereof, or by any judge of the circuit court upon such terms and conditions as to security on the part of the plaintiff for the damages which may be occasioned by them, and with such direction as to the disposition to be made of the attached property, as may be just and proper under the circumstances of each case.

History. Civil Code, § 266; Acts 1871, No. 48, § 1 [266], p. 219; 1877, No. 49, § 1, p. 48; C. & M. Dig., § 556; Pope's Dig., § 593; A.S.A. 1947, § 31-303.

CASE NOTES

Clerk.

This section does not authorize the clerk to issue the order of attachment, but merely authorizes him to grant it. Baker v. Ayers, 58 Ark. 524, 25 S.W. 834 (1894).

16-110-205. Security and bond.

(a) In every case the plaintiff shall be required to give security for the damage to the defendant in an adequate sum to be specified in the order granting the attachment.

(b) When it may be proper, the court, or judge or clerk thereof, may direct that the defendant or person in possession of the attached property be permitted to retain it upon giving bond, with security, for such sum as the court, or judge or clerk thereof, may prescribe.

(c) No order of attachment shall be issued by the clerk until the bond on the part of the plaintiff required by the order of the court, or judge or clerk thereof, is executed and filed in his or her office by one (1) or more sufficient securities of the plaintiff.

History. Civil Code, §§ 267, 268; Acts 1877, No. 49, §§ 2, 3, p. 48; C. & M. Dig., §§ 557, 558; Pope's Dig., §§ 594, 595; A.S.A. 1947, §§ 31-304, 31-305.

CASE NOTES

Analysis

Failure to give bond.
Order by clerk.

Failure to Give Bond.

Where plaintiff fails to give bond, the attachment will be subject to a motion to quash or to set aside the order. Alexander v. Pardue, 30 Ark. 359 (1875).

Order by Clerk.

Where clerk grants order of attachment, an order in writing made by the clerk directing himself to issue the order is superfluous and unnecessary. Baker v. Ayers, 58 Ark. 524, 25 S.W. 834 (1894).

Cited: Terminal Truck Brokers v. Memphis Truck & Trailer, Inc., 279 Ark. 427, 652 S.W.2d 34 (1983).

16-110-206. Order of attachment.

(a) The order of attachment shall describe the specific property against which it is issued and shall have endorsed upon it the direction

of the court, or judge or clerk thereof, as to the disposition to be made of the attached property.

(b) It shall be directed, executed, and returned as other orders of attachment.

History. Civil Code, § 269; Acts 1877, No. 49, § 4, p. 48; C. & M. Dig., § 559; Pope's Dig., § 596; A.S.A. 1947, § 31-306.

16-110-207. Disposition of attached property.

The sheriff shall make such disposition of the attached property as may be directed by the court, or judge or clerk thereof. When there is no direction upon the subject, he or she shall safely keep the property subject to the order of the court.

History. Civil Code, § 270; Acts 1877, No. 49, § 5, p. 48; C. & M. Dig., § 560; Pope's Dig., § 597; A.S.A. 1947, § 31-307.

CASE NOTES

Liability for Wrongful Surrender.

A sheriff who surrenders property seized by him under a writ of specific attachment to a claimant without authority from court or the plaintiff and without actually taking bond is responsible for actual damages; however, if he shows that the property was not subject to the writ, he will be liable for nominal damages only. De Yampert v. Johnson, 54 Ark. 165, 15 S.W. 363 (1891).

16-110-208. Conditions of bond to obtain discharge.

The court may, in any of the cases mentioned in § 16-110-202 or 16-110-203, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment.

History. Civil Code, § 271; C. & M. Dig., § 561; Pope's Dig., § 598; A.S.A. 1947, § 31-308.

16-110-209. Removal of property from county.

Where, after an order of attachment against specific property has been placed in the hands of the sheriff, the property is removed from the county, the sheriff may pursue and attach it in another county within twenty-four (24) hours after the removal.

History. Civil Code, § 272; C. & M. Dig., § 562; Pope's Dig., § 599; A.S.A. 1947, § 31-309.

16-110-210. Concealment of property.

Where it appears, by return of the sheriff or by the affidavit of the plaintiff, that any specific property against which an order of attachment is issued has been concealed or removed by the defendant, the court may require him or her to attend and be examined on oath respecting the matter and may enforce its orders in this respect as in cases of contempt.

History. Civil Code, § 273; C. & M. Dig., § 563; Pope's Dig., § 600; A.S.A. 1947, § 31-310.

16-110-211. Enforcement of bonds.

Performance of bonds to obtain discharge of specific attachments or for the forthcoming of property specifically attached may, in all cases, be summarily enforced by rules and proceedings as in cases of contempt.

History. Civil Code, § 274; C. & M. Dig., § 564; Pope's Dig., § 601; A.S.A. 1947, § 31-311.

Subchapter 3 — Attachment of Boats and Vessels

SECTION.
16-110-301. Liability for debts for building, repairing, fitting, etc.
16-110-302. Liability for contracts and torts.
16-110-303. Affidavit for attachment.
16-110-304. Election of remedy.
16-110-305. Bond of plaintiff.
16-110-306. Filing complaint on return of attachment.
16-110-307. Procedure.
16-110-308. Collection of wages.
16-110-309. Discharging bond.

Effective Dates. Acts 1860, No. 17, § 4: effective on passage.

16-110-301. Liability for debts for building, repairing, fitting, etc.

(a) Boats and vessels of all descriptions built, repaired, or equipped in this state, or running upon any of the navigable waters of this state, shall be liable for all debts contracted by the owners, masters, or supercargoes, or assignees thereof, on account of all work done, or supplies or materials furnished, by mechanics, tradesmen, and others for, on account of, or towards building, repairing, fitting, furnishing, or equipping the boats or vessels, their engines, machinery, sails, rigging, tackle, apparel, and furniture.

(b) The debts shall have the preference of all other debts due from the owners or proprietors, except wages of mariners, boatmen, and

others employed in the service of boats and vessels, which shall be first paid.

History. Rev. Stat., ch. 14, § 1; C. & M. Dig., § 585; Pope's Dig., § 622; A.S.A. 1947, § 31-401.

CASE NOTES

Jurisdiction.

The states cannot empower their courts to proceed in rem against a boat after the manner of the admiralty courts where a maritime lien is involved; however, contracts for shipbuilding and furnished material are not maritime contracts and may be enforced in the state courts. Davis v. Mason, 44 Ark. 553 (1884).

16-110-302. Liability for contracts and torts.

(a) All boats and vessels of all descriptions built, repaired, or equipped in this state, or running upon any of the navigable waters of this state, shall be liable for all contracts of every kind made by the owners, masters, or supercargoes of the boats or vessels for or on account of the boats or vessels.

(b) When the boats or vessels mentioned in subsection (a) of this section commit any tort whatever, the boats or vessels shall be liable for the tort.

(c) For all contracts and torts mentioned in this section, the boats or vessels may be sued by name or description and attached in the manner now prescribed by law in other cases of attachment of boats and vessels.

History. Acts 1860, No. 17, §§ 1-3, p. 27; C. & M. Dig., §§ 586-588; Pope's Dig., §§ 623-625; A.S.A. 1947, §§ 31-402 — 31-404.

RESEARCH REFERENCES

Ark. L. Rev. Steamboat Renaissance: The Rationale of Choice for Inland Admiralty Practice, 21 Ark. L. Rev. 336.

CASE NOTES

Jurisdiction.

The states cannot empower their courts to proceed in rem against a boat after the manner of the admiralty courts where a maritime lien is involved; however, contracts for shipbuilding and furnished material are not maritime contracts and may be enforced in the state courts. Davis v. Mason, 44 Ark. 553 (1884).

16-110-303. Affidavit for attachment.

Any person having a demand, contracted as mentioned in § 16-110-301, against any boat or vessel, upon affidavit being made and filed with the clerk of the circuit court, setting forth the nature and the amount of the demand, and upon bond being given by the plaintiff as in other cases of attachment may have an attachment, to be issued by the clerk

of the circuit court, in any county in the state in which the boat or vessel may be found.

History. Rev. Stat., ch. 14, § 2; C. & M. Dig., § 589; Pope's Dig., § 626; A.S.A. 1947, § 31-405; Acts 2003, No. 1185, § 228.

Amendments. The 2003 amendment deleted "or with any justice of the peace" following the first occurence of "circuit court" and "or by any justice of the peace having jurisdiction of the amount claimed" following the second occurence of "circuit court."

CASE NOTES

In General.

For the attachment of boats in the state courts, the same affidavit is required as in attachment of other property. Thompson v. Robinson, 34 Ark. 44 (1879).

16-110-304. Election of remedy.

(a) The plaintiff may make his or her election either to proceed against the owner or owners by their proper names or by the name and style of their partnership, if known, or against the boat or vessel by its name or description only.

(b) The writ shall authorize and direct the seizure and detention of the boat or vessel, her engine, machinery, sails, rigging, tackle, apparel, and furniture by the sheriff or constable.

History. Rev. Stat., ch. 14, § 4; C. & M. Dig., § 590; Pope's Dig., § 627; A.S.A. 1947, § 31-406.

16-110-305. Bond of plaintiff.

In all cases where the proceedings are instituted against the boat or vessel by its name or description only, the bond to be given by the plaintiff shall be made payable to the State of Arkansas, for the use and benefit of the owners of the boat or vessel. The owners may institute a suit thereon, if damages are occasioned by the issuing of the attachment wrongfully, and have recovery thereon in the same manner as if the bond had been given to the person in his or her proper name, or in the name and style of the partnership.

History. Rev. Stat., ch. 14, § 5; C. & M. Dig., § 591; Pope's Dig., § 628; A.S.A. 1947, § 31-407.

16-110-306. Filing complaint on return of attachment.

Upon the return of the attachment, the plaintiff shall file a written declaration or statement against the boat or vessel by its name or description or against the owner or owners, as the case may be. The declaration or statement shall briefly recite the nature of the demand, whether for work and labor done or for materials, firewood, or provisions furnished, and whether at the request of the owner, master,

supercargo, or consignee of the boat or vessel, and that the demand remains unpaid. The plaintiff shall annex to the declaration or statement a bill of the particulars constituting the demand, in separate and distinct items.

History. Rev. Stat., ch. 14, § 6; C. & M. Dig., § 592; Pope's Dig., § 629; A.S.A. 1947, § 31-408.

16-110-307. Procedure.

The attachment shall proceed in like manner in all other respects, and like judgment and execution shall be had, as in other cases of attachment.

History. Rev. Stat., ch. 14, § 7; C. & M. Dig., § 593; Pope's Dig., § 630; A.S.A. 1947, § 31-409.

16-110-308. Collection of wages.

All engineers, pilots, mariners, boatmen, and others employed in any capacity in or about the boat or vessel who may be entitled to arrearages of wages in consequence of their services may proceed to collect the wages under the provisions of §§ 16-110-301 and 16-110-303 — 16-110-309 and shall be entitled to all the benefits thereof.

History. Rev. Stat., ch. 14, § 8; C. & M. Dig., § 594; Pope's Dig., § 631; A.S.A. 1947, § 31-410.

16-110-309. Discharging bond.

If the owner, master, supercargo, or consignee of any such boat or vessel seized by attachment shall, at any time before judgment, give bond to the plaintiff with security to be approved by the clerk of the circuit court or by the judge, as the case may be, in double the amount of the demand sued for, conditioned to pay and satisfy such judgment as the court may render against the boat or vessel, or against the owner, as the case may be, together with cost of suit, then the boat or vessel shall forthwith be discharged from the attachment, seizure, and detention. The boat shall nevertheless be liable to be taken and sold on any execution to be issued on any such judgment or upon the judgment that may be rendered at any time on the bond required to be given by the defendant party.

History. Rev. Stat., ch. 14, § 9; C. & M. Dig., § 595; Pope's Dig., § 632; A.S.A. 1947, § 31-411; Acts 2003, No. 1185, § 229.

Amendments. The 2003 amendment deleted "in term time, or justice of the peace" following "judge" and "or justice" following "satisfy such judgment as the court."

Subchapter 4 — Garnishment Proceedings

SECTION.
16-110-401. Grounds.
16-110-402. Procedure in issuing writs of garnishment.
16-110-403. Filing of interrogatories.
16-110-404. Answers to interrogatories.
16-110-405. Denial of answer.
16-110-406. Failure of bank to answer.
16-110-407. Failure of garnishee to answer.
16-110-408. Discharge of garnishment issued before judgment upon filing of bond by defendant.
16-110-409. Discharge of garnishee before judgment upon surrender of property.
16-110-410. Discharge of garnishee upon judgment or judgment for plaintiff.
16-110-411. Effect of judgment against garnishee.
16-110-412. Issuance of writ and judgment to another county.
16-110-413. Garnishment against state or subdivision after judgment.
16-110-414. Garnishment against railroad for certain wages after judgment.
16-110-415. Garnishment of wages.
16-110-416. Notice to employer garnishee.
16-110-417. Handling costs for withholding.

Cross References. Exemption of wages of laborers and mechanics from garnishment, § 16-66-208.

Effective Dates. Acts 1889, No. 115, § 13: effective on passage.

Acts 1895, No. 134, § 2: effective on passage.

Acts 1897 (Ex. Sess.), No. 43, § 3: effective on passage.

Acts 1923, No. 627, § 20, provided: "That ...each and every part of this act shall be deemed to be retroactive to the date when Act 113 of the Acts of the General Assembly of 1913 first took effect, except only insofar as any part of this act is herein expressly made to take effect at a subsequent date, and except only insofar as any suit now pending, other than ex parte liquidation of the affairs of an insolvent bank, may be affected thereby; and that this act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force from and after its passage."

Acts 1925, No. 177, § 5: approved Mar. 21, 1925. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety an emergency is declared and this act shall take effect from and after its passage."

Acts 1991, No. 1027, § 8: Apr. 8, 1991. Emergency clause provided: "It is found and determined by the General Assembly that the Supreme Court of Arkansas held in Bob Hankins Distributing Company v. Willie Francies May, 90-227, Opinion Delivered March 18, 1991, that the Arkansas garnishment laws violate a garnishee's right to due process of law as guaranteed by the fourteenth amendment to the United States Constitution because they do not provide for an adequate notice to garnishees that they may be liable for the judgment against the debtor if they failed to properly answer the writ of garnishment. Therefore, an emergency is declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Creditors' Rights — Garnishment of a Joint Bank Account, 18 Ark. L. Rev. 352.

Note, Aluminum Company of America v. Higgins: Bankruptcy's Automatic Stay Meets Arkansas Garnishment, 36 Ark. L. Rev. 591.

Laurence, The Supreme Court and the Defaulting Garnishee, etc., 40 Ark. L. Rev. 1.

Note, Holdway v. Duvoisin: Garnishment Payments as Preferences Under Section 547, 43 Ark. L. Rev. 217.

UALR L.J. Legislative Survey, Business Law, 4 UALR L.J. 579.

Notes, Garnishment Procedures Must Provide for Notice to Postjudgment Debtor, etc., 9 UALR 517.

Survey — Debtor-Creditor, 10 UALR L.J. 173.

Survey — Debtor-Creditor, 10 UALR L.J. 573.

Survey — Debtor/Creditor Relations, 14 UALR L.J. 767.

CASE NOTES

Statutes Controlling.

To the extent the garnishment procedures prescribed in this subchapter differ from those prescribed in the Rules of Civil Procedure, the statutes control. Travelodge Int'l, Inc. v. Handleman Nat'l Book Co., 288 Ark. 368, 705 S.W.2d 440 (1986).

Cited: Jones v. Goodson, 299 Ark. 495, 772 S.W.2d 609 (1989).

16-110-401. Grounds.

(a)(1) In all cases where any plaintiff may begin an action in any court of record, or before any justice of the peace, or may have obtained a judgment before any of the courts, and the plaintiff shall have reason to believe that any other person is indebted to the defendant or has in his or her hands or possession goods and chattels, moneys, credits, and effects belonging to the defendant, the plaintiff may sue out a writ of garnishment, setting forth the claim, demand, or judgment and commanding the officer charged with the execution thereof to summon the person therein named as garnishee, to appear at the return day of the writ and answer what goods, chattels, moneys, credits, and effects he or she may have in his or her hands or possession belonging to the defendant to satisfy the judgment, and answer such further interrogatories as may be exhibited against him.

(2) Further, the writ of garnishment served on the garnishee shall contain one (1) of the following notices:

(A)

"NOTICE TO NON-EMPLOYER GARNISHEE

FAILURE TO ANSWER THIS WRIT WITHIN 20 DAYS OR FAILURE OR REFUSAL TO ANSWER THE INTERROGATORIES ATTACHED HERETO SHALL RESULT IN THE COURT ENTERING A JUDGMENT AGAINST YOU AND YOU BECOMING PERSONALLY LIABLE FOR THE FULL AMOUNT SPECIFIED IN THIS WRIT TOGETHER WITH COSTS OF THIS ACTION AS PROVIDED BY ARKANSAS CODE ANNOTATED § 16-110-407."; or,

(B)

"NOTICE TO EMPLOYER GARNISHEE

FAILURE TO ANSWER THIS WRIT WITHIN 20 DAYS OR FAILURE OR REFUSAL TO ANSWER THE INTERROGATORIES AT-

TACHED HERETO SHALL RESULT IN THE COURT ENTERING A JUDGMENT AGAINST YOU AND YOU BECOMING PERSONALLY LIABLE FOR THE AMOUNT OF THE NON-EXEMPT WAGES OWED THE DEBTOR-EMPLOYEE ON THE DATE YOU WERE SERVED THIS WRIT AS PROVIDED BY ARKANSAS CODE ANNOTATED § 16-110-407."

(3) This notice shall be in addition to the notice required to employer garnishees under § 16-110-416.

(b) However, if the garnishment is issued before the judgment, the plaintiff shall give bond in double the amount for which the garnishment is issued that he or she will pay the defendant all damages that he or she may sustain by the wrongful bringing of his or her suit or the issuing of the garnishment.

History. Acts 1889, No. 115, § 1, p. 168; 1895, No. 134, § 1, p. 196; C. & M. Dig., § 4906; Pope's Dig., § 6119; A.S.A. 1947, § 31-501; Acts 1991, No. 1027, § 3.

A.C.R.C. Notes. Acts 1991, No. 1027, § 5, provided: "The provisions of this act shall be effective with respect to any writs of garnishment issued after April 8, 1991, regardless of the date of judgment on the debt or obligation of the judgment debtor."

Publisher's Notes. This section was held unconstitutional, as violating due process, in Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986) and In re McDougal, 65 Bankr. 495 (Bankr. W.D. Ark. 1986).

The 1987 amendment to § 16-110-402 appears to address the due process concerns raised in Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986) and In re McDougal, 65 Bankr. 495 (Bankr. W.D. Ark. 1986). However, the provisions of this subchapter in effect in 1987 were again held unconstitutional in Bob Hankins Distrib. Co. v. May, 305 Ark. 56, 805 S.W.2d 625 (1991).

Acts 1991, No. 1027, § 2, provided that the act would neither amend nor repeal § 16-110-406.

CASE NOTES

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Constitutionality.
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Subjects of garnishment.
—Exemptions from garnishment.
—Items subject to garnishment.
—Joint bank accounts.

Constitutionality.

A prejudgment garnishment is unconstitutional regardless of whether it is against wages or accounts receivable. G.A.C. Trans-World Acceptance Corp. v. Jaynes Enter., Inc., 255 Ark. 752, 502 S.W.2d 651 (1973).

Because the statutes pertaining to postjudgment garnishment, this section and §§ 16-66-208 and 16-66-211, do not require notice to the judgment debtor informing him or her of the garnishment, notice of possible state and federal exemptions, a prompt hearing to permit the judgment debtor to claim exemptions, an affidavit from the creditor stating that the writ would not cause the attachment of exempt funds, or the posting of a bond to compensate the judgment debtor for injury in case of wrongful garnishment, these sections do not contain sufficient procedural safeguards to prevent erroneous seizures to satisfy due process and thus are unconstitutional as violative of the due process clause of the Fourteenth Amendment of the United States Constitution. Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986).

This section is violative of due process because property of the debtor is subject to garnishment without prior notice. In re McDougal, 65 Bankr. 495 (Bankr. W.D. Ark. 1986).

Since this section is invalid, the creditor's service of a writ of garnishment on the debtor's insurer did not create a lien, and the creditor was unsecured. In re McDougal, 65 Bankr. 495 (Bankr. W.D. Ark. 1986).

Service on garnishee was invalid due to the invalidity of this section on which it was based, and the constitutional deficiency was not supplied by actual notice to garnishee of items constitutionally required. Gravett v. Marks, 304 Ark. 549, 803 S.W.2d 551 (1991).

The Arkansas garnishment provisions in effect at the time of the action were unconstitutional insofar as they did not require that adequate notice be given to the garnishee that his property may be subject to satisfaction of the original judgment when served with a writ of garnishment. Bob Hankins Distrib. Co. v. May, 305 Ark. 56, 805 S.W.2d 625 (1991).

In General.

Garnishment vests in the plaintiff a complete right to the indebtedness, including a lien to secure the payment thereof. Smith v. Butler, 72 Ark. 350, 80 S.W. 580 (1904).

Garnishment creates a lien on the money due from the garnishee. Saint Louis S.W. Ry. v. Vanderberg, 91 Ark. 252, 120 S.W. 993 (1909).

The effect of the service of the writ of garnishment is to impound all property in the hands of the garnishee belonging to the judgment debtor at the time of service, or that may thereafter come into his hands, up until the filing by his of a true and correct answer. Harris v. Harris, 201 Ark. 684, 146 S.W.2d 539 (1941).

Beneficiary waived any right to challenge insurance company's decision to withhold annuity payments by failing to seek a hearing and determination on his motion to quash the September 16, 1999, writ of garnishment before the writ of garnishment was issued on October 4, 2002; when a writ of garnishment was issued, it reached money held by others belonging to the defendant, in this case, the beneficiary, and the sum was subject to garnishment as money then owning by the insurance company. Thompson v. Bank of Am., 356 Ark. 576, 157 S.W.3d 174 (2004).

Construction.

This section must be strictly construed. Beasley v. Haney, 96 Ark. 568, 132 S.W. 646 (1910).

Strict compliance with garnishment statutes and judicial process is essential to the validity of garnishment proceedings. Hervey v. Farms, Inc. 252 Ark. 881, 481 S.W.2d 348 (1972).

Applicability.

This section has no applicability to equitable garnishments. C.A. Rees & Co. v. Pace, 156 Ark. 473, 246 S.W. 491 (1923).

This section must be construed in the light of historical background of various statutes authorizing garnishment and attachment proceedings, and therefore does not extend to tort actions against residents. Allen v. Stracener, 214 Ark. 688, 217 S.W.2d 620 (1949).

A judgment creditor had a remedy under the garnisment statutes and, therefore, could not bring a separate action for fraud where a company first identified itself as a garnishee for a judgment debtor and then, three months later, amended its response to claim that it was not the judgment debtor's employer. T & T Materials, Inc. v. Mooney, 340 Ark. 646, 12 S.W.3d 635 (2000).

Bankruptcy.

The automatic stay provisions of the Bankruptcy Code do not automatically stay a proceeding against a guarantor of the bankrupt debtor. The filing of a voluntary petition in bankruptcy effects an automatic stay as to the commencement or continuance of any claim against the debtor or his estate, but the stay is not for the benefit of other parties. ALCOA v. Higgins, 5 Ark. App. 296, 635 S.W.2d 290 (1982).

Where the federal bankruptcy court clerk twice mistakenly told the garnishee employer that it was not required to file an answer in the pending garnishment proceeding because the debtor employee's filing of a bankruptcy petition effected an automatic stay as to any claim against the debtor or his estate, the failure of the garnishee employer to file an answer, limiting its liability to the moneys it may have held for and owed to the debtor

employee was due to excusable neglect and the judgment rendered against the garnishee employer would be reversed. ALCOA v. Higgins, 5 Ark. App. 296, 635 S.W.2d 290 (1982).

Defenses.

Where a garnishee in an attachment proceeding answered that his indebtedness to the defendant, if any, would be determined in certain pending suits, a delay on the plaintiff's part of more than five years before taking further steps to enforce his claim against the garnishee was such laches as would prevent his having the final decrees therein applied to the payment of his claim, where such suits were prosecuted in the defendant's name for the benefit of other creditors. Johnson v. Meyer, 60 Ark. 50, 28 S.W. 797 (1894).

Equity will not restrain the repeated issuance of writs of garnishment against a master for the purpose of seizure of a servant's wages alleged to be exempt upon an allegation that the purpose of the defendant in issuing such writs is to annoy and harass the plaintiff and tie up his wages, the remedy, if any, being at law for a malicious abuse of process. Baxley v. Laster, 82 Ark. 236, 101 S.W. 755 (1907).

A railroad company, when sued in this state upon a complaint in favor of an employee residing here, could defend on the ground that judgment against it had been previously served in a garnishment proceeding instituted in another state in favor of creditor of plaintiff. Saint Louis S.W. Ry. v. Vanderberg, 91 Ark. 252, 120 S.W. 993 (1909).

Judgment.

Judgment against garnishee cannot be lawfully rendered until judgment is rendered against the defendant. Saint Louis, I.M. & S. Ry. v. McDermitt, 91 Ark. 112, 120 S.W. 831 (1909); W.A. Smith & Bros. v. Spinnenweber & Peters, 114 Ark. 384, 170 S.W. 84 (1914); Smith v. Bank, 115 Ark. 216, 170 S.W. 1008 (1914).

Federal Civil Rights Act did not have effect or removing judicial immunity of justice of the peace so as to permit plaintiff to maintain action against justice of peace in federal court based on allegation that justice of peace, while acting under color of office, issued unlawful writs of garnishment before judgment. Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955); Thompson v. Baker, 133 F. Supp. 247 (W.D. Ark. 1955).

Jurisdiction.

Justice of the peace has no jurisdiction of garnishment of claim exceeding $300. Traylor v. Allen, 61 Ark. 13, 31 S.W. 570 (1895).

A citizen of the state can garnish a foreign railroad company operating within the state for a debt due to one of its employees for labor performed in the state, though employee is a resident of a foreign state. Kansas City P. & G. Ry. v. Parker, 69 Ark. 401, 63 S.W. 996 (1901).

Jurisdiction of nonresident debtor is acquired by garnishment of debt owing to him by resident and publication of warning letter. Johnson v. Foster, 69 Ark. 617, 65 S.W. 105 (1901).

The situs of a debt for the purposes of garnishment is wherever the debtor may be found. Saint Louis S.W. Ry. v. Vanderberg, 91 Ark. 252, 120 S.W. 993 (1909).

Where the plaintiff sued the Dillard & Kilgore Co., a corporation, and procured a judgment to be sued out against a third person and subsequently sued the Dillard & Kilgore Co., a partnership, but in the latter suit did not procure a garnishment to be issued against the third person, no jurisdiction of the latter was acquired in the suit against the partnership. Edwin Schiele & Co. v. Dillard, 94 Ark. 277, 126 S.W. 835 (1910).

Jurisdiction of a justice of the peace is coextensive with the county in garnishment. Foster v. Pollack Co., 173 Ark. 48, 291 S.W. 989 (1927).

Where there was but a single defendant, the clerk of the court had no authority to name another as judgment debtor in writ of garnishment. Garner v. Cluck, 209 Ark. 912, 193 S.W.2d 661 (1946).

After judgment, a writ of execution or garnishment is issuable only from the court in which the judgment was rendered. McGehee Bank v. Charles W. Greeson & Sons, 223 Ark. 18, 263 S.W.2d 901 (1954).

A garnishee cannot be held upon a garnishment when the court from which it is issued has no jurisdiction of the subject matter of the principal cause of action. Hervey v. Farms, Inc., 252 Ark. 881, 481 S.W.2d 348 (1972).

In the absence of a statute providing

otherwise, only the court in which the judgment was rendered has authority to issue a garnishment thereon. Hervey v. Farms, Inc., 252 Ark. 881, 481 S.W.2d 348 (1972).

Liability of Garnishees.

An employer is not liable as garnishee when his employee has, in the line of his employment, collected funds in excess of his salary which he has failed to pay over. Frank v. Dungan & Lee, 76 Ark. 599, 90 S.W. 17 (1905).

Where a railway company was properly served with writs of garnishment in which were given the correct names of the defendants to whom the garnishee was indebted, no subsequent payment of the money in the garnishee's hands belonging to such defendants would relieve it of liability, even though made to the defendants under assumed names, if the garnishee's officers or agents in charge knew that the persons to whom the payments were made were the defendants. Saint Louis, S.W. Ry. v. Matiatas, 97 Ark. 206, 133 S.W. 600 (1910).

The garnishee who, in an action before a justice, pays the money garnished to the plaintiff will be liable for the money to an intervener who has filed an interplea claiming the money and when, on appeal from a judgment of the justice dismissing the interplea, it is determined that he is entitled to the money in the garnishee's hands. Citizens Bank v. Commercial Nat'l Bank, 107 Ark. 142, 155 S.W. 102 (1913).

Where garnishee's answer which admitted owing judgment debtor was not denied, judgment for greater amount could not be rendered and garnishee would not be required to take notice of any act or order of the court except rendition of judgment or order to pay over the amount stated. Magnolia Petroleum Co. v. Wasson, 192 Ark. 554, 92 S.W.2d 860 (1936).

A garnishee after service of the writ upon him must retain possession of all property and effects of the principal debtor in his hands, and if he fails to do so, he is liable for the value of the property and effects to the plaintiff in the principal action. Harris v. Harris, 201 Ark. 684, 146 S.W.2d 539 (1941).

Garnishee making payments on his note in possession of judgment debtor at the time of service of writ and paying to him, prior to filing full, true, and complete answers to interrogatories, amount more than necessary to pay judgment was liable for amount of judgment though note was not due when payments were made. Harris v. Harris, 201 Ark. 684, 146 S.W.2d 539 (1941).

Where writ of garnishment was quashed and no supersedeas bond was filed to supersede the order of quashing, the garnishee was released from the garnishment and judgment could not be obtained against garnishee, notwithstanding appeal from order quashing garnishment. Griffin v. Murdock Acceptance Corp., 227 Ark. 1018, 303 S.W.2d 242 (1957).

Where final judgment was entered against bank which was subject to plaintiff's levy of execution and writ of garnishment by a creditor of plaintiff, all parties were not interpled, plaintiff's creditor failed to file writ of garnishment with court clerk after bank posted supersedeas bond, and clerk paid settlement amount to plaintiff from proceeds of bond on court approval, subsequent judgment making plaintiff's creditor's writ of garnishment a lien on bank's judgment debt to plaintiff was reversed as bank was subject to the hazard of being liable for the same debt twice and was not required to file an interpleader action. Independence Fed. Bank v. Paine Webber, 302 Ark. 324, 789 S.W.2d 725 (1990).

Notice.

Actual notice is insufficient where a notice statute is constitutionally insufficient. Gravett v. Marks, 304 Ark. 549, 803 S.W.2d 551 (1991).

Actual notice was insufficient where statutory notice required by former subchapter was constitutionally insufficient. Bob Hankins Distrib. Co. v. May, 305 Ark. 56, 805 S.W.2d 625 (1991).

Pleadings.

The burden of proof is not met by proving contradictory statements of garnishee & his agents. Frank v. Dungan & Lee, 76 Ark. 599, 90 S.W. 17 (1905).

A writ of garnishment may not issue until after an action has been commenced by filing a complaint and procuring summons to be issued. First Nat'l Bank v. Rhode Island Ins. Co., 184 Ark. 812, 43 S.W.2d 535 (1931).

In garnishment proceeding, equitable or statutory, recovery can be had only to the date of filing answer. Magnolia Petroleum Co. v. Wasson, 192 Ark. 554, 92 S.W.2d 860 (1936).

An oral answer by a garnishee to allegations contained in a writ of garnishment issued out of a municipal court was held to amount to a failure to answer justifying judgment by default against garnishee. Harmon v. Bell, 204 Ark. 290, 161 S.W.2d 744 (1942).

Where an action was begun by the filing of a complaint in the office of the clerk of the proper court and placing the summons in the hand of the officer, the fact that the service of summons was quashed did not render void the writ of garnishment sued out after the action was begun. Mainprize v. Bates, 240 Ark. 249, 398 S.W.2d 894 (1966).

Garnishee waived no statutory protection by signing over guaranty surrendering defaulted contract rights to garnishor where the latter proceeded, without due notice, upon garnishment rather than contract grounds; nor could garnishor raise the waiver for the first time on appeal. G.A.C. Trans-World Acceptance Corp. v. Jaynes Enters., Inc., 255 Ark. 752, 502 S.W.2d 651 (1973).

Where the garnishee, judgment debtor had filed in interpleader and did not contest the validity of the garnishments, the garnishee's rights were guarded and the garnishments were valid. Equifax, Inc. v. Luster, 463 F. Supp. 352 (E.D. Ark. 1978), aff'd sub nom. United States v. Olson, 604 F.2d 29 (8th Cir. 1979).

Subjects of Garnishment.

Where property is placed in the hands of a person as a pledge for a debt, it cannot be taken by garnishment until the debt is paid. Patterson v. Harland, 12 Ark. 158 (1851).

In the absence of a statute authorizing it, a fund in court is not subject to garnishment until the purpose for which it is held is accomplished. Green v. Robertson, 80 Ark. 1, 96 S.W. 138 (1906).

Where one holds funds of a debtor as trustee to be paid pro rata to all of his creditors, such funds cannot be taken by a garnishment at the instance of one of the creditors; but any fund left in the trustee's hands after execution of the trust by paying to the creditors who accepted it their pro rata of the funds are subject to garnishment. State Nat'l Bank v. Wheeler-Motter Mercantile Co., 104 Ark. 222, 148 S.W. 1033 (1912').

—Exemptions from Garnishment.

The fact that land sold by a debtor did not constitute his homestead did not deprive him of the right to hold the purchase money received therefor exempt from garnishment as personal property. Wheeler v. Eatman, 67 Ark. 133, 53 S.W. 571 (1899).

Garnishment is not proper writ to fasten lien on corporate stock. H.B. Claflin Co. v. Bretzfelder, 69 Ark. 271, 62 S.W. 905 (1901).

Where the evidence showed that the judgment debtor was a sharecropper and his portion of the proceeds from the cotton crop would be one-half of the gross, less the cost advanced for seed, fertilizer, and picking, which could not be determined at the time of service of garnishment because the crop had not yet been picked, the amount due the sharecropper was entirely contingent and not subject to garnishment. Coward v. Barnes, 232 Ark. 177, 334 S.W.2d 894 (1960).

—Items Subject to Garnishment.

Debts contracted, although not presently payable or matured, but which will certainly become payable in the future, may be reached by garnishment. Harris v. Harris, 201 Ark. 684, 146 S.W.2d 539 (1941).

Widow's share of the proceeds of a partition sale in possession of chancery clerk who conducted the sale was a fund in court subject to garnishment based on judgment obtained by heirs against widow for their share of rents and profits derived by her from the realty since her husband's death. Dove v. Donn, 203 Ark. 719, 158 S.W.2d 259 (1942).

Trial court finding that, even though husband owned one-half of the funds in joint bank account with his wife, one owning judgment against husband could not maintain writ of garnishment against the bank was error; any funds adjudged to belong to the husband were subject to garnishment. Hayden v. Gardner, 238 Ark. 351, 381 S.W.2d 752 (1964).

—Joint Bank Accounts.

A joint bank account is prima facie subject to garnishment, i.e., there is a presumption that the money is owned by

the judgment debtor. Maloy v. Stuttgart Mem. Hosp., 42 Ark. App. 16, 852 S.W.2d 819 (1993), aff'd, 316 Ark. 447, 872 S.W.2d 401 (1994).

Garnishment of two certificates of deposit, held jointly in the names of debtor and her mother, upheld. Maloy v. Stuttgart Mem. Hosp., 316 Ark. 447, 872 S.W.2d 401 (1994).

Cited: Sharum v. Dodson, 264 Ark. 57, 568 S.W.2d 503 (1978); May v. Bob Hankins Distrib. Co., 301 Ark. 494, 785 S.W.2d 23 (1990); Gravett v. Marks, 304 Ark. 549, 803 S.W.2d 551 (1991); Moory v. Quadras, Inc., 333 Ark. 624, 970 S.W.2d 275 (1998).

16-110-402. Procedure in issuing writs of garnishment.

The following procedure shall be followed in issuing writs of garnishment:

(1)(A) Notice to Defendant. Upon application for a writ of garnishment by any qualified judgment creditor, the clerk of the court shall attach to said writ the following "Notice to Defendant":

"NOTICE TO DEFENDANT OF YOUR RIGHT TO KEEP WAGES, MONEY, AND OTHER PROPERTY FROM BEING GARNISHED

The Writ of Garnishment or Writ of Execution delivered to you with this Notice means that wages, money, or other property belonging to you has been garnished in order to pay a court judgment against you. HOWEVER, YOU MAY BE ABLE TO KEEP YOUR MONEY OR PROPERTY FROM BEING TAKEN, SO READ THIS NOTICE CAREFULLY.

State and federal laws say that certain money and property may not be taken to pay certain types of court judgments. Such money or property is said to be 'exempt' from garnishment.

For example under the Arkansas Constitution and state law, you will be able to claim as exempt all or part of your wages or other personal property.

As another example, under federal law the following are also exempt from garnishment:

Social Security, SSI, Veteran's benefits, AFDC (welfare), unemployment compensation, and workers' compensation.

You have a right to ask for a court hearing to claim these or other exemptions. If you need legal assistance to help you try to save your wages or property from being garnished, you should see a lawyer. If you can't afford a private lawyer, contact your local bar association or ask the clerk's office about any legal services program in your area."

(B) As an alternative, the "Notice to Defendant" may be incorporated as a part of the writ.

(2)(A) Service and Return; Mailing of Copies. Writs of garnishment together with the "Notice to Defendant" shall be directed, served, and returned in the same manner as writs of summons. In addition, the judgment creditor is responsible for mailing a copy of the writ of garnishment and the "Notice to Defendant" to the judgment debtor the same day that he or she serves the writ of garnishment and the "Notice to Defendant" on the garnishee.

(B) The judgment creditor shall mail the writ of garnishment, and the "Notice to Defendant", by first-class mail, to the residence of the judgment debtor. However, if the letter is returned "undeliverable" by the post office, or if the residence address of the judgment debtor is not discoverable after diligent search, then the writ of garnishment and the "Notice to Defendant" shall be sent by first-class mail to the judgment debtor at his or her place of employment.

(3) Mailing of Annual Notice. The judgment creditor shall not be required to mail another "Notice to Defendant" to the judgment debtor for future garnishments on the same debt within twelve (12) months of the original garnishment. If further garnishments are filed thereafter, then the notice shall be required to be mailed by the judgment creditor annually.

(4) Certificate of Service Statement. The circuit clerk shall include as a part of the writ of garnishment a certification statement of the above service on the judgment debtor. The judgment creditor must complete the certificate of service statement by listing the name and address of the judgment debtor and the date of mailing. The statement must be signed by the judgment creditor or his or her attorney.

(5) Hearing. Upon receipt of the writ of garnishment, the judgment debtor is entitled to a prompt hearing in which to claim exemptions. Upon filing a claim of exempt property or wages, a hearing will be held within eight (8) working days to determine the validity of the claimed exemptions. No hearing shall be required and a writ of supersedeas shall issue unless the judgment creditor files, within five (5) days, a statement in writing that the judgment debtor's claim of exemption is contested.

History. Acts 1889, No. 115, § 2, p. 168; C. & M. Dig., § 4909; Pope's Dig., § 6122; A.S.A. 1947, § 31-504; Acts 1987, No. 523, § 1.

RESEARCH REFERENCES

UALR L.J. Survey — Debtor-Creditor, 10 UALR L.J. 573.

CASE NOTES

Analysis

Constitutionality.
In general.
Attachment of liens.
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Joinder of garnishees.
Liability.
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Constitutionality.

Constitutionality of a writ of garnishment is not something which an employer-garnishee must determine before complying with its terms. Walsh v. Wal-Mart Stores, Inc., 836 F.2d 1152 (8th Cir. 1988).

In General.

Strict compliance with garnishment statutes and judicial process is essential to the validity of garnishment proceedings. Hervey v. Farms, Inc., 252 Ark. 881, 481 S.W.2d 348 (1972).

Beneficiary had a right of $750 per month from the insurance company as long as he may live, and the insurance company had a contractual obligation to pay the beneficiary the sum each month,

but there was no debt presently due or certain to come due until the day of payment arrived and the beneficiary was alive. Thompson v. Bank of Am., 356 Ark. 576, 157 S.W.3d 174 (2004).

Attachment of Liens.

The debt is bound in the hands of the garnishee from the time of the service of the writ, and the right of a garnishor to a satisfaction of his judgment out of the debt cannot be defeated by a subsequent payment of the garnishee, whether made voluntarily or by legal coercion. Desha v. Baker, 3 Ark. 509 (1841); Watkins v. Field, 6 Ark. 391 (1846); Martin v. Foreman, 18 Ark. 249 (1856).

The lien of a garnishment dates from the time the garnishment writ is served upon the garnishee, and a sale and transfer by the defendant of his choses in action, not subject to execution, before such service will be good. The burden of proof that a purchase of debts made on the same day of the service of a garnishment was before the service is upon the purchaser. Bergman v. Sells & Co., 39 Ark. 97 (1882).

Foreign Judgments.

Foreign child-support judgments and accompanying writs of garnishment are recognized and enforced by Arkansas courts under the Uniform Enforcement of Foreign Judgments Act, § 16-66-601 et seq., and the Uniform Reciprocal Enforcement of Support Act, § 9-14-301 et seq. (repealed). Walsh v. Wal-Mart Stores, Inc., 836 F.2d 1152 (8th Cir. 1988).

Judgment debtor failed to state a claim upon which relief could be granted where he sought judgment in the amount of wages withheld by his employer pursuant to a writ of garnishment entered in a state court and enforced under the Arkansas Uniform Reciprocal Enforcement of Support Act, § 9-14-301 et seq. (repealed), alleging that the writ was facially invalid, that he did not receive notice of his rights, and that his employer knew that this fact rendered the garnishment invalid. Walsh v. Wal-Mart Stores, Inc., 836 F.2d 1152 (8th Cir. 1988).

Invalid Service.

Where a writ of garnishment was issued on a bank and the sheriff contended that he served it on a vice-president of the bank but no notation was made on the return that the bank president was not available, the service was invalid. First Nat'l Bank v. H & M Lumber Co., 252 Ark. 175, 477 S.W.2d 850 (1972).

Joinder of Garnishees.

A writ of garnishment may be against several garnishees where the writ, allegations, and interrogatories show a joint indebtedness and a joint possession of goods. Moreland v. Pelham, 7 Ark. 338 (1847).

It is error to join several garnishees in the same writ of garnishment without allegations of joint liability or indebtedness. Cincinnati & Little Rock Slate Co. v. Bridge & Co., 17 Ark. 364 (1856).

Liability.

An employer presented with a court order and writ of garnishment is required to comply with that order and garnish its employee's wages; failure to garnish may render the employer-garnishee liable to the judgment creditor. Walsh v. Wal-Mart Stores, Inc., 836 F.2d 1152 (8th Cir. 1988).

Notice.

This section places the responsibility upon the judgment creditor, not the garnishee, to insure that the judgment debtor receives notice of his rights as required by Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986); Walsh v. Wal-Mart Stores, Inc., 836 F.2d 1152 (8th Cir. 1988).

Notice to judgment debtor, to be constitutional, need not supply the judgment debtor with a "laundry list" of statutory or constitutional exemptions or inform him of all available exemptions. Such notice need only inform the debtor that postjudgment execution is being levied and that state and federal exemptions may be available with respect to the property subject to the levy. Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990).

Cited: DeSoto, Inc. v. Crow, 257 Ark. 882, 520 S.W.2d 307 (1975); Kennedy v. Kelly, 295 Ark. 678, 751 S.W.2d 6 (1988); McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988); Stephens v. Walker, 743 F. Supp. 670 (W.D. Ark. 1990); May v. Bob Hankins Distrib. Co., 301 Ark. 494, 785 S.W.2d 23 (1990); Brimer v. State, 301 Ark. 540, 785 S.W.2d 458 (1990); Turner v. Farnam, 82 Ark. App. 489, 120 S.W.3d 616 (2003).

16-110-403. Filing of interrogatories.

The plaintiff shall, on the day on which he or she sues out his writ of garnishment, prepare and file all the allegations and interrogatories, in writing, with the clerk or justice issuing the writ upon which he or she may be desirous of obtaining the answer of the garnishee touching the goods and chattels, moneys, credits, and effects of the defendant, and the value thereof, in his or her hands and possession, at the time of the service of the writ or at any time thereafter.

History. Acts 1889, No. 115, § 3, p. 168; C. & M. Dig., § 4910; Pope's Dig., § 6123; A.S.A. 1947, § 31-505.

CASE NOTES

Analysis

Purpose.
Filing requirements.
Joinder of garnishees.

Purpose.

This section was enacted for the benefit of the garnishee and not as a prerequisite to acquiring a lien on funds in the hands of a garnishee. Lerner v. Lutes, 184 Ark. 1133, 45 S.W.2d 33 (1932).

Filing Requirements.

The allegations and interrogatories may be filed with the clerk at any time before the expiration of the return day of the writ, and it is not necessary that they be filed in open court, or that the filing appear off record. Moreland v. Pelham, 7 Ark. 338 (1847); Lawrence v. Sturdivent, 10 Ark. 130 (1849); Richardson v. White, 19 Ark. 241 (1857).

In garnishments, the allegations and interrogatories should conform to the writ. Frizzell v. Willard, 37 Ark. 478 (1881).

Judgment against garnishee without allegations and interrogatories is irregular, but not void. Little Rock Traction & Elec. Co. v. Wilson, 66 Ark. 582, 53 S.W. 43 (1899).

Suit failed where the interrogatories filed merely sought information upon which to base a subsequent suit. State v. Phillips Petroleum Co., 212 Ark. 530, 206 S.W.2d 771 (1947).

Joinder of Garnishees.

When the effects of a defendant are in the hands of several persons who are jointly liable to him for them, and they are not under the exclusive control of either of them, all must be joined as garnishees before interrogatories can be filed against either. Frizzell v. Willard, 37 Ark. 478 (1881).

Cited: Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955).

16-110-404. Answers to interrogatories.

The garnishee shall, on the return day named in the writ, exhibit and file, under his oath, full, direct, and true answers to all such allegations and interrogatories as may have been exhibited against him or her by the plaintiff.

History. Acts 1889, No. 115, § 4, p. 168; C. & M. Dig., § 4911; Pope's Dig., § 6124; A.S.A. 1947, § 31-506.

CASE NOTES

Analysis

In general.
Admissions.
Failure to answer.
Liability of garnishees.

In General.

The answer of a garnishee must be taken as prima facie true, and if not contradicted or if no issue is taken thereon, it will be presumed to be absolutely true. Beasley v. Haney, 96 Ark. 568, 132 S.W. 646 (1910).

Admissions.

A garnishee answering and admitting his indebtedness, as the maker of negotiable paper, without reserve or qualification, does so at his peril. If notified at any time before final judgment that his note had been assigned before the service of the writ upon him, he is bound to apply for leave to interpose the defense. Cross v. Haldeman, 15 Ark. 200 (1854).

Failure to Answer.

Oral answer by garnishee to allegations contained in writ of garnishment issued out of a municipal court was held to amount to a failure to answer justifying judgment by default against garnishee. Harmon v. Bell, 204 Ark. 290, 161 S.W.2d 744 (1942).

A garnishee did not comply with this section by filing an unverified answer signed only by his attorneys. Bohner v. Faught, 237 Ark. 639, 374 S.W.2d 825 (1964).

Garnishee did not substantially comply with this section by mailing answers to interrogatories in an unverified letter to the judgment creditor's attorney without filing them with the court. Professional Adjustment Bureau, Inc. v. Williams, 299 Ark. 462, 773 S.W.2d 824 (1989).

Liability of Garnishees.

Garnishee making payments on his note in possession of judgment debtor at the time of service of writ and paying to him, prior to filing full, true, and complete answers to interrogatories, amount more than necessary to pay judgment was liable for amount of judgment, though note was not due when payments were made. Harris v. Harris, 201 Ark. 684, 146 S.W.2d 539 (1941).

A garnishee filing an untrue answer is liable for sums paid by him to the judgment debtor until a correct answer is filed. Bell v. West, 241 Ark. 89, 406 S.W.2d 316 (1966).

Cited: O'Connor v. Methodist Hosp., 42 Bankr. 390 (Bankr. E.D. Ark. 1984); Medical & Dental Credit Bureau, Inc. v. Lake Hamilton Camp & Conference Grounds, 291 Ark. 353, 724 S.W.2d 477 (1987).

16-110-405. Denial of answer.

(a) If the garnishee files his or her answer to the interrogatories exhibited and the plaintiff deems the answers untrue or insufficient, he or she may deny the answer and cause his or her denial to be entered on the record.

(b) The court or justice, if neither party requires a jury, shall proceed to try the facts put in issue by the answer of the garnishee and the denial of the plaintiff.

History. Acts 1889, No. 115, § 5, p. 168; C. & M. Dig., § 4912; Pope's Dig., § 6125; A.S.A. 1947, § 31-508.

CASE NOTES

Analysis

In general.
Denial of answer.
Trial of issues.
Unsatisfactory answer.

In General.

The law provides a statutory remedy for a party who proves, after a trial on the issues, that false answers to interrogatories propounded with a writ of garnishment have been filed; thus, no separate and independent fraud action exists in any county arising out of the alleged untruthful or insufficient answers to interrogatories exhibited against any garnishee. T&T Materials Inc. v. Mooney, 68 Ark. App. 77, 4 S.W.3d 512 (1999), aff'd, 340 Ark. 646, 12 S.W.3d 635 (2000).

Denial of Answer.

Where a school district, being garnished, answered that the contractor abandoned the work he undertook to do and that the work done by him was without value, such answer, not being denied, will be conclusive and garnishment dismissed. Hoxie Lumber Co. v. Chidister, 184 Ark. 612, 43 S.W.2d 69 (1931).

A garnishee's answer not denied is conclusive of the truth of its allegations. Southwestern Gas & Elec. Co, v. W. O. Perkins & Son, 185 Ark. 830, 49 S.W.2d 606 (1932).

The answer of a garnishee is not conclusive of the facts which it recites, but it is prima facie true and must be controverted as provided by the statute. Graham v. Littleton, 198 Ark. 763, 131 S.W.2d 637 (1939).

The answer of a garnishee must be taken as prima facie true, and if not controverted or if no issue is taken thereon, it will be presumed to be absolutely true. Wyatt Lumber & Supply Co. v. Hansen, 201 Ark. 534, 147 S.W.2d 366 (1940).

Denial of garnishee's answer must be in writing. Beasley v. Haney, 96 Ark. 568, 132 S.W. 646 (1910); Wyatt Lumber & Supply Co. v. Hansen, 201 Ark. 534, 147 S.W.2d 366 (1940).

Trial of Issues.

Upon a trial of issues made under this section, the court could not render judgment for the full amount of the plaintiff's judgment because of the fact that the garnishee's answer was defective in that it was unverified and signed only by his attorneys, but could only render judgment according to the evidence. Bohner v. Faught, 237 Ark. 639, 374 S.W.2d 825 (1964).

In an action at law, alleged fraud in assignment of the fund subject to garnishment, which assignment is pledged by the garnishee defendant as a defense, may not be tried when all claimants of the fund are not before the court, even though the fund might be subjected to payment of a debt to the garnisher in another proceeding. Saunders v. Adcock, 249 Ark. 856, 462 S.W.2d 219 (1971).

Unsatisfactory Answer.

The proper practice in a justice's court where a garnishee in an attachment suit fails to answer satisfactorily the answers and allegations propounded to him is to institute a suit against him; a personal judgment against the garnishee in the original suit is not authorized. Nelson v. Blanks, 67 Ark. 347, 56 S.W. 867 (1900).

16-110-406. Failure of bank to answer.

(a) If any garnishee that is a bank, savings bank, or trust company domiciled in this state, after having been served with a writ of garnishment ten (10) days before the return day thereof, shall neglect to answer on or before the return day the writ or any interrogatories which have been exhibited against it, the court or justice before whom the matter is pending shall enter judgment in general terms against the garnishee. The general judgment shall be deemed to be for costs of the garnishment and for an amount not exceeding the full amount specified in the plaintiff's judgment against the original defendant and also not exceeding the amount or value in which at the time when served and thereafter up to and including said return day the garnishee was indebted, or had in its hands or possession goods, chattels, moneys, credits, and effects belonging to the original defendant.

(b) At any time after the general judgment the plaintiff may have, from the court or justice in the matter, a discovery against the garnishee and at its cost to ascertain the specific amount due thereunder.

History. Acts 1913, No. 113, [§ 62], as added by Acts 1923, No. 627, § 7; Pope's Dig., § 746; A.S.A. 1947, § 31-507.

Publisher's Notes. The time for filing pleadings in civil actions is now governed by ARCP 12.

Acts 1991, No. 1027, § 2, provided that the act would neither amend nor repeal this section.

CASE NOTES

Liability.

The liability of a bank, on failure to timely answer a writ of garnishment, is limited to the amount which the bank owed the debtor up until the time the bank answered. Woodcock v. First Com. Bank, 283 Ark. 490, 683 S.W.2d 605 (1985).

Cited: Searcy Steel Co. v. Mercantile Bank, 19 Ark. App. 220, 719 S.W.2d 277 (1986).

16-110-407. Failure of garnishee to answer.

(a) If any garnishee, after having been duly served with a writ of garnishment, shall neglect or refuse to answer the interrogatories exhibited to him or her, on or before twenty (20) days after service of the writ, the court, upon motion of the plaintiff, may issue a notice to the garnishee, requiring him or her to appear personally at a hearing not later than ten (10) days after receipt of said notice or at such other later date as the court may fix and answer the allegations and interrogatories of the plaintiff. Service of the notice may be made either by the clerk, or by the plaintiff, by any method prescribed by Arkansas Rules of Civil Procedure for service of notice.

(b) The court, after hearing and reviewing the evidence and testimony of both parties, may then render judgment against the garnishee in such amount, if any, as the court finds the garnishee held at the time of service of the writ of garnishment, of any goods, chattels, wages, credits and effects belonging to the defendant, not otherwise exempt under state or federal law; together with attorney's fees and such other reasonable expenses incurred by the plaintiff, as the court may deem appropriate under the facts and circumstances.

History. Acts 1889, No. 115, § 9, p. 168; C. & M. Dig., § 4916; Pope's Dig., § 6129; A.S.A. 1947, § 31-512; Acts 1989, No. 463, § 1; 1991, No. 1027, § 1.

A.C.R.C. Notes. Acts 1991, No. 1027, § 5, provided: "The provisions of this act shall be effective with respect to any writs of garnishment issued after the effective date of this act, regardless of the date of judgment on the debt or obligation of the judgment debtor."

Publisher's Notes. The time for filing pleadings in civil actions is now governed by ARCP 12.

Acts 1991, No. 1027, § 2, provided that the act would neither amend nor repeal § 16-110-406.

RESEARCH REFERENCES

Ark. L. Rev. Laurence, the Supreme Court and the Defaulting Garnishee, Redux: An Essay on McCourt Manufacturing Company v. The Credit Bureau of Fort Smith and a Few of Its Predecessors, 49 Ark. L. Rev. 1.

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

CASE NOTES

Analysis

Appeals.
Liability upon default.
Time to answer.

Appeals.

The order ascertaining amount of garnishee's indebtedness is appealable, and subject to supersedeas. Furstenheim v. Adams, 42 Ark. 283 (1883).

Where the garnishee filed an unverified answer signed only by his attorneys, the judgment plaintiff, by filing a denial of such answer and going to trial on the issues thus made, without questioning the lack of verification, is deemed to have waived such defect in the answer and cannot raise the question for the first time on appeal. Bohner v. Faught, 237 Ark. 639, 374 S.W.2d 825 (1964).

Liability upon Default.

The default of the garnishee admits his liability to the full extent of plaintiff's demand, and no proof is necessary to charge him. Wilson v. Phillips, 5 Ark. 183 (1843).

Final judgment may be rendered against a garnishee upon default made by him or when on trial the court finds that he is indebted to the defendant in the original judgment. Wilson v. Overturf, 157 Ark. 385, 248 S.W. 898 (1923).

Oral answer by garnishee to allegations contained in writ of garnishment issued out of a municipal court was held to amount to a failure to answer justifying judgment by default against garnishee. Harmon v. Bell, 204 Ark. 290, 161 S.W.2d 744 (1942).

Where garnishee filed no responsive pleading within the time fixed by statute, judgment was properly rendered against garnishee. Karoley v. A. R. & T. Elecs., Inc., 235 Ark. 609, 363 S.W.2d 120 (1962).

Any recovery to which judgment creditor would be entitled from garnishee because of garnishee's failure to file timely answer to allegations would be limited to the amount alleged by the creditor to be due the debtor by the garnishee. Carter v. Helena Marine Serv., Inc., 251 Ark. 876, 475 S.W.2d 528 (1972).

Time to Answer.

This section was amended by implication as pertaining to circuit courts, and thus the time to answer a summons or writ of garnishment should not be less than 20 days. DeSoto, Inc. v. Crow, 257 Ark. 882, 520 S.W.2d 307 (1975).

Cited: O'Connor v. Methodist Hosp., 42 Bankr. 390 (Bankr. E.D. Ark. 1984); Woodcock v. First Com. Bank, 283 Ark. 490, 683 S.W.2d 605 (1985); May v. Bob Hankins Distrib. Co., 301 Ark. 494, 785 S.W.2d 23 (1990); Adams v. Owen, 316 Ark. 99, 870 S.W.2d 741 (1994); McCourt Mfg. Co. v. Credit Bureau, 319 Ark. 23, 888 S.W.2d 650 (1994).

16-110-408. Discharge of garnishment issued before judgment upon filing of bond by defendant.

(a)(1) Whenever a garnishment is issued in any action before judgment, the defendant may have the garnishment discharged and all funds or property of his or hers in the hands of the garnishee released therefrom by filing with the clerk of the court a bond in double the amount for which the garnishment was issued that he or she will pay

any judgment which may finally be rendered against him or her in the action.

(2) Upon judgment being rendered against the defendant, summary judgment may be rendered against the sureties in the bond.

(b) The bond provided for in this section shall be executed as surety by some surety company authorized to transact business in the State of Arkansas or by at least two (2) individuals who are residents and citizens of the county in which the suit is pending. In addition, each of them shall be the owner of real estate located in the county, worth over and above all encumbrances against the property and all exemptions allowed by law to the surety, a sum equal to or in excess of the amount of the bond so executed.

(c) Before any clerk shall approve any bond so presented, he or she shall require that the sureties on the bond, if they are individuals, to qualify on the bond by making oath to the facts required in subsection (b) of this section. If any person shall knowingly swear falsely in the affidavit, he or she shall be deemed guilty of perjury and be punished accordingly.

(d) The clerk shall satisfy himself or herself of the sufficiency of the bond before he or she shall approve it. If the clerk shall approve the bond, he or she shall file it and shall issue a notice directed to the garnishee notifying him or her of the filing and approval of the bond and the release of the garnishment. The notice shall be signed by the clerk, bear the seal of the court, and be served on the garnishee by the sheriff or constable, and return shall be made thereon as in cases of other writs of process.

History. Acts 1925, No. 177, §§ 1-4; Pope's Dig., §§ 6132-6135; A.S.A. 1947, §§ 31-515 — 31-518; Acts 2003, No. 1185, § 230.

Amendments. The 2003 amendment, deleted "or the justice of the peace before whom action may be pending" following "clerk of the court" in (a); in (c), deleted "or justice of the peace" following "clerk" and substituted "subsection (b) of this section" for "preceding paragraph"; in (d), deleted "or justice of the peace" following "The clerk," "or justice of the peace issuing it and if issued by the clerk it shall also" preceding "bear the seal of the court" and "shall" preceding "be served on the garnishee."

Cross References. Perjury, § 5-53-102.

CASE NOTES

Analysis

In general.
Sureties.

In General.

Where the defendants executed and filed a bond for the release of a garnishment, the garnishment is thereby eliminated and it cannot thereafter be quashed or dismissed on motion. Kettle Creek Ref. Co. v. Scales, 181 Ark. 295, 25 S.W.2d 446 (1930).

Sureties.

Where a judgment dismissing a suit and discharging garnishments was not superseded on appeal, the surety on a bond securing release of the funds impounded by the garnishments was also discharged. Hot Springs Concrete Co. v. Rosamond, 180 Ark. 690, 22 S.W.2d 368 (1929).

Upon giving a bond to release a garnishment, the garnishees were no longer in court and a subsequent judgment should have been directed against the sureties on

the bond. Kettle Creek Ref. Co. v. Scales, 181 Ark. 295, 25 S.W.2d 446 (1930).

16-110-409. Discharge of garnishee before judgment upon surrender of property.

(a) If on the return day of any writ of garnishment the garnishee shall surrender to the plaintiff all the goods and chattels, moneys, credits, and effects which may be in his or her hands or possession belonging to the defendant, he or she shall be discharged with costs.

(b) The court or justice shall enter up an order releasing and discharging the garnishee from all responsibility to the defendant, in relation to the goods and chattels, moneys, credits, and effects so surrendered.

History. Acts 1889, No. 115, § 7, p. 168; C. & M. Dig., § 4914; Pope's Dig., § 6127; A.S.A. 1947, § 31-510.

CASE NOTES

Cited: L & S Concrete Co. v. Bibler Bros., 34 Ark. App. 181, 807 S.W.2d 50 (1991).

16-110-410. Discharge of garnishee upon judgment or judgment for plaintiff.

(a) If the issue is found for the garnishee, he or she shall be discharged without further proceedings.

(b) However, if the issue is found for the plaintiff, judgment shall be entered for the amount due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment, with costs.

History. Acts 1889, No. 115, § 6, p. 168; C. & M. Dig., § 4913; Pope's Dig., § 6126; A.S.A. 1947, § 31-509.

CASE NOTES

Analysis

In general.
Appeals.
Discharge of garnishee.
Judgment against garnishee.

In General.

The law provides a statutory remedy for a party who proves, after a trial on the issues, that false answers to interrogatories propounded with a writ of garnishment have been filed; thus, no separate and independent fraud action exists in any county arising out of the alleged untruthful or insufficient answers to interrogatories exhibited against any garnishee. T&T Materials Inc. v. Mooney, 68 Ark. App. 77, 4 S.W.3d 512 (1999), aff'd, 340 Ark. 646, 12 S.W.3d 635 (2000).

Appeals.

An appeal lies to the circuit court from the judgment of a justice of the peace in a garnishment proceeding. Smith v. Parker, 25 Ark. 518 (1869).

Discharge of Garnishee.

Where the plaintiff gave the bond required as a prerequisite for the issuance of garnishment before judgment and subsequently released the surety on the application, but granted leave to the plaintiff to file a new bond, which was not done, whereupon the garnishee was discharged, it was held, in the absence of a showing in the record to the contrary, that it will be presumed that the court acted upon evidence sufficient to sustain the order releasing the surety and discharging the garnishee. Helton v. Howe, 162 Ark. 243, 258 S.W. 391 (1924).

Judgment Against Garnishee.

It is error to render judgment against the garnishee until judgment is obtained against defendant. Adler-Goldman Comm. Co. v. Bloom, 62 Ark. 616, 37 S.W. 305 (1896); Norman v. Poole, 70 Ark. 127, 66 S.W. 433 (1902).

A "judgment" against a garnishee which does not specify the amount to be paid is not a final judgment. Lawrence v. Ford Motor Credit Co., 247 Ark. 1125, 449 S.W.2d 695 (1970).

16-110-411. Effect of judgment against garnishee.

In all cases where judgment shall be rendered against any garnishee on an answer to interrogatories filed, the judgment shall have the effect to release the garnishee from all responsibility in relation to the goods and chattels, moneys, credits, and effects for which the judgment may have been rendered.

History. Acts 1889, No. 115, § 8, p. 168; C. & M. Dig., § 4915; Pope's Dig., § 6128; A.S.A. 1947, § 31-511.

CASE NOTES

Indeterminate Amount.

Where a garnishee is ordered to pay over an indeterminate amount of money, he should be discharged when the amount is determined and paid into court. Lawrence v. Ford Motor Credit Co., 247 Ark. 1125, 449 S.W.2d 695 (1970).

16-110-412. Issuance of writ and judgment to another county.

Writs of garnishment may be issued from the circuit court of one (1) county to any other county in the state.

History. Acts 1889, No. 115, §§ 10, 11, p. 168; C. & M. Dig., §§ 4917, 4918; Pope's Dig., §§ 6130, 6131; A.S.A. 1947, §§ 31-513, 31-514; Acts 2003, No. 1185, § 231.

Amendments. The 2003 amendment deleted (b).

CASE NOTES

Analysis

Judgments by justices of peace.
Jurisdiction.

Judgments by Justices of Peace.

A writ of garnishment may be issued from the circuit court of one county to any other county in the state upon judgment for an amount exceeding $10 rendered by a justice of the peace of which certified copies have been duly filed in the circuit court, as well as upon judgment originally rendered in the circuit court. Saint Louis & S.F.R.R. v. Bowman, 76 Ark. 32, 88 S.W. 1033 (1905).

Jurisdiction.

After judgment, a writ of execution or

garnishment is issuable only from the court in which the judgment was rendered. McGehee Bank v. Charles W. Greeson & Sons, 223 Ark. 18, 263 S.W.2d 901 (1954).

Upon the failure of the husband to pay "statutory dower," the chancery court had the power to issue garnishment and/or execution on its decree. Horn v. Horn, 232 Ark. 723, 339 S.W.2d 852 (1960).

In the absence of a statute providing otherwise, only the court in which the judgment was rendered has authority to issue a garnishment thereon. Hervey v. Farms, Inc., 252 Ark. 881, 481 S.W.2d 348 (1972).

16-110-413. Garnishment against state or subdivision after judgment.

(a)(1) Any indebtedness, goods and chattels, moneys, credits, or effects, except for refunds for overpayment of Arkansas state income tax belonging to a defendant in a civil action and in the hands or possession of the State of Arkansas, or any subdivision thereof, institution, department, or special district or instrumentality of the State of Arkansas, shall be subject to garnishment as is now provided by law.

(2) Nothing in subdivision (a)(1) shall be construed in any way to eliminate or limit the provisions of § 26-36-301 et seq. concerning the set-off of debt owed to a state program.

(b)(1) Any writ of garnishment sued out pursuant to this section shall be served upon the individual representing the State of Arkansas, subdivision thereof, institution, department, special district, or instrumentality of the State of Arkansas, who has such indebtedness, goods and chattels, moneys, credits, or effects in his or her custody, and he or she shall answer the writ and satisfy the garnishment as provided by law.

(2) However, if the writ of garnishment is of salary or wages, it shall be served upon, answered, and satisfied by the institution, agency, department, special district, or instrumentality employing the person whose salary or wages are sought by the garnishment.

(c) A writ of garnishment shall be sued out pursuant to this section only after judgment.

History. Acts 1945, No. 44, §§ 1-3; 1965, No. 441, § 1; A.S.A. 1947, §§ 31-519 — 31-521; Acts 1987 (1st Ex. Sess.), No. 41, § 1; 1987 (1st Ex. Sess.), No. 55, § 1.

Publisher's Notes. Acts 1987 (1st Ex. Sess.), No. 55, was vetoed by the Governor. However, such veto was held invalid by the Attorney General (Opinion No. 87-241) on the grounds that the veto occurred after the expiration of the twenty-day period allowed by Ark. Const., Art. 6, § 15. Accordingly, the act became law on June 26, 1987.

RESEARCH REFERENCES

UALR L.J. Survey — Debtor-Creditor, 10 UALR L.J. 573.

CASE NOTES

Analysis

Constitutionality.
Applicability.
Disbursing officers.
Exemptions.

Constitutionality.

This section is constitutional. Ross v. Rich, 210 Ark. 74, 194 S.W.2d 297 (1946).

Applicability.

This section has no applicability to funds held custodia legis. McGill v. Robbins, 231 Ark. 411, 329 S.W.2d 540 (1959).

Disbursing Officers.

Judgment requiring garnishee disbursing officer to turn over to clerk of the circuit court so much of judgment defendant's salary as required to satisfy judgment would be modified to require disbursing officer to issue his voucher to such clerk for so much of judgment defendant's salary as is necessary to satisfy judgment, since no money passes through hands of disbursing officer. Ross v. Rich, 210 Ark. 74, 194 S.W.2d 297 (1946).

Exemptions.

This section does not impair the right to claim as exempt any wages due the employee, when that right otherwise exists. Ross v. Rich, 210 Ark. 74, 194 S.W.2d 297 (1946).

16-110-414. Garnishment against railroad for certain wages after judgment.

(a) No garnishment shall be issued by any court in any cause where the sum demanded is two hundred dollars ($200) or less, and where the property sought to be reached is wages due to a defendant by any railroad corporation, until after judgment has been recovered by the plaintiff against the defendant in the action.

(b)(1) No railroad corporation shall be required to make answer to, nor shall any default or other liability attach because of its failure to answer any interrogatories propounded to it, in any action against any person to whom it may be indebted on account of wages due for personal services, where a writ of garnishment was issued in advance of the recovery by plaintiff of a personal judgment against the defendant in any action for two hundred dollars ($200) or less.

(2) Any judgment rendered against any railroad corporation for its failure or refusal to make answer to any garnishment so issued before the recovery of final judgment in the action between the plaintiff and defendant in the cases mentioned in subsection (a) of this section shall be void. Any officer entering such a judgment or who may execute or attempt to execute the judgment shall be taken and considered a trespasser.

History. Acts 1897 (Ex. Sess.), No. 43, §§ 1, 2, p. 109; C. & M. Dig., §§ 4907, 4908; Pope's Dig., §§ 6120, 6121; A.S.A. 1947, §§ 31-502, 31-503.

CASE NOTES

Analysis

Constitutionality.
Applicability.

Constitutionality.

This section constitutes a valid exercise of the state's power. Saint Louis, I.M. & S. Ry. v. Walsh, 86 Ark. 147, 110 S.W. 222 (1908).

Applicability.

This section applies to garnishment by

attachment. Metcalf v. St. Louis, I.M. & S. Ry., 101 Ark. 193, 141 S.W. 1167 (1911).

Cited: Stone v. Drake, 79 Ark. 384, 96 S.W. 197 (1906).

16-110-415. Garnishment of wages.

(a) Upon the garnishment of salaries, wages, or other compensation due from the employer garnishee, the employer garnishee shall hold, to the extent of the amount due upon the judgment and costs, subject to the order of the court, any nonexempt wages due or which subsequently become due. The judgment or balance due thereon is a lien on salaries, wages, or other compensation due at the time of the service of the execution, or as set out in subsection (b) of this section.

(b) The lien provided for in subsection (a) of this section shall continue as to subsequent earnings until the total amount due upon the judgment and costs is paid or satisfied. The lien on subsequent earnings shall terminate sooner if the employment relationship is terminated or if the underlying judgment is vacated or modified.

History. Acts 1981, No. 794, §§ 1-3; A.S.A. 1947, §§ 31-522 — 31-524; Acts 1991, No. 192, § 1; 1995, No. 276, § 1.

CASE NOTES

Cited: Thompson v. Bank of Am., 356 Ark. 576, 157 S.W.3d 174 (2004).

16-110-416. Notice to employer garnishee.

In any garnishment of salaries, wages, or other compensation due from the employer garnishee, the plaintiff shall include the following notice to the employer garnishee:

"NOTICE TO EMPLOYER GARNISHEE"

The amount of wages available for withholding for this judgment and costs is subject to certain prior claims. Under Arkansas law, income withholding for child support has a priority over all other legal processes. Under federal law, the total amount to be withheld cannot exceed the maximum amount allowed under § 303(b)."

History. Acts 1989, No. 463, § 2.

A.C.R.C. Notes. The reference in this section to "§ 303(b)" probably is to Public Law 90-321, Title III, § 303, which is codified as 15 U.S.C. § 1673.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

16-110-417. Handling costs for withholding.

(a) A payor may withhold up to two dollars and fifty cents ($2.50) per pay period in addition to any court-ordered income withholding amount for the administrative cost incurred in each withholding.

(b) The income withholding provisions of this section shall not apply to unemployment compensation benefits except to the extent allowed pursuant to the procedures set forth in §§ 11-10-109 and 11-10-110.

(c) The income withholding provisions of this section shall not apply to workers' compensation benefits except to the extent allowed pursuant to the procedures set forth in § 11-9-110.

History. Acts 1997, No. 972, § 1.

CHAPTER 111

DECLARATORY JUDGMENTS

SECTION.

16-111-101. Definition.
16-111-102. Legislative declaration — Purpose — Construction.
16-111-103. Power of courts to declare rights, status, etc. — Form of declaration.
16-111-104. Right to determination generally.
16-111-105. Right to determination in administration of trust or estate.
16-111-106. Parties.
16-111-107. Jury trial.
16-111-108. Refusal to render judgment or decree.
16-111-109. Review.
16-111-110. Supplementary relief.
16-111-111. Costs.

Publisher's Notes. For Comments regarding the Uniform Declaratory Judgments Act, see Commentaries Volume B.

Cross References. Declaratory judgments, ARCP 57.

RESEARCH REFERENCES

ALR. When is person in governmental custody for purpose of exercise of remedy. 26 ALR 4th 455.

Right to jury trial in action for declaratory relief in state court. 33 ALR 4th 146.

Am. Jur. 22A Am. Jur. 2d, Decl. J., § 1 et seq.

Ark. L. Rev. Proceedings of Legal Institute — Panel on Declaratory Judgments, 8 Ark. L. Rev. 53.

Judicial Review of Administrative Agencies in Arkansas, 25 Ark. L. Rev. 397.

C.J.S. 26 C.J.S., Decl. J., § 1 et seq.

CASE NOTES

Cited: Fairchild v. Norris, 317 Ark. 166, 876 S.W.2d 588, cert. denied, 513 U.S. 974, 115 S. Ct. 448, 130 L. Ed. 2d 357 (1994); Potty Pals, Inc. v. Carson Fin. Group, Inc., 887 F. Supp. 208 (E.D. Ark. 1995).

16-111-101. Definition.

As used in this chapter, unless the context otherwise requires, the word "person" shall be construed to mean any person, partnership, joint-stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

History. Acts 1953, No. 274, § 12; A.S.A. 1947, § 34-2512.

Publisher's Notes. Acts 1953, No. 274, § 13, provided: "The several sections and provisions of this act, except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative."

RESEARCH REFERENCES

Ark. L. Rev. Leopold and Beyer, Ante-Mortem Probate: A Viable Alternative, 43 Ark. L. Rev. 131.

Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

CASE NOTES

Newspapers.

Since this section provides that the word "person" shall also mean, inter alia, a corporation of any character whatsoever, a newspaper reporter had standing to have her right to attend committee meeting of board of trustees of university declared by the court. Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350 (1975).

Cited: Roberts v. Watts, 263 Ark. 822, 568 S.W.2d 1 (1978); Integon Life Ins. Co. v. Vandegrift, 11 Ark. App. 270, 669 S.W.2d 492 (1984); Arkansas Hwy. & Transp. Dep't v. Hope Brick Works, Inc., 294 Ark. 490, 744 S.W.2d 711 (1988); Bryant v. English, 311 Ark. 187, 843 S.W.2d 308 (1992); Stilley v. James, 345 Ark. 362, 48 S.W.3d 521 (2001); City of Fort Smith v. Didicom Towers, Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 348 (June 2, 2005).

16-111-102. Legislative declaration — Purpose — Construction.

(a) This chapter is declared to be remedial.

(b) Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.

(c) This chapter is to be liberally construed and administered.

History. Acts 1953, No. 274, § 11; A.S.A. 1947, § 34-2511.

CASE NOTES

Cited: Roberts v. Watts, 263 Ark. 822, 568 S.W.2d 1 (1978); Lawson v. City of Mammoth Spring ex rel. Smith, 287 Ark. 12, 696 S.W.2d 712 (1985); Traveler's Indem. Co. v. Olive's Sporting Goods, Inc., 297 Ark. 516, 764 S.W.2d 596 (1989); Stilley v. James, 345 Ark. 362, 48 S.W.3d 521 (2001); Wilmans v. Sears, Roebuck & Co., 355 Ark. 668, 144 S.W.3d 245 (2004).

16-111-103. Power of courts to declare rights, status, etc. — Form of declaration.

(a) Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

(1) No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.

(2) The declaration may be either affirmative or negative in form and effect and declarations shall have the force and effect of a final judgment or decree.

(b) The enumeration in §§ 16-111-104 and 16-111-105 does not limit or restrict the exercise of the general powers conferred in subsection (a) of this section, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

History. Acts 1953, No. 274, §§ 1, 4; A.S.A. 1947, §§ 34-2501, 34-2504.

CASE NOTES

Analysis

In general.
Discretion of court.
Federal jurisdiction.
Final order.
Jurisdiction.
Justiciable controversy.
Sufficiency of complaints.
Writ of habeas corpus.

In General.

Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. Bryant v. Picado, 338 Ark. 227, 996 S.W.2d 17 (1999).

Discretion of Court.

Declaratory judgment statutes are intended to supplement rather than supersede ordinary causes of action. Consequently, when another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction. UHS of Ark., Inc. v. Charter Hosp., 297 Ark. 8, 759 S.W.2d 204 (1988).

Federal Jurisdiction.

In an action to enjoin the assessment and collection of taxes, and where the plaintiffs had a plain, speedy, and efficient remedy in the Arkansas courts under this section, § 14-90-501, § 14-90-804, and § 16-113-306, the Tax Injunction Act, 28 U.S.C. § 1341, barred federal jurisdiction. Burris v. City of Little Rock, 941 F.2d 717 (8th Cir. 1991).

Final Order.

Order denying the motion for declaratory judgment was not a final order. Vanderpool v. Fidelity & Cas. Ins. Co., 322 Ark. 308, 908 S.W.2d 653 (1995).

Jurisdiction.

The mere fact that petitioner sought a declaratory judgment in addition to an injunction did not give the court jurisdiction to grant the injunction. Robinson v. Morgan, 228 Ark. 1091, 312 S.W.2d 329 (1958).

Where a jurisdictional question was not free from doubt and it was quite possible that the chancery court, if the petition for declaratory judgment were entertained, might decide the point one way while the justice of the peace court in which city had filed action, or the circuit court on appeal, might reach exactly the opposite conclusion, it would be manifestly desirable if such jurisdictional question be finally determined in the suit at law where it arose in the first instance. Cabot v. Morgan, 228 Ark. 1084, 312 S.W.2d 333 (1958).

Aside from the Declaratory Judgment Act, the chancery court had jurisdiction of question to determine whether homestead property was exempt from a judgment for unemployment contributions, interest, and penalty assessed pursuant to the provisions of the Arkansas Employment Security Act under its traditional equitable jurisdiction to remove clouds on title to real estate. White v. Thornbrough, 229 Ark. 96, 313 S.W.2d 384 (1958).

Chancery courts have jurisdiction to render declaratory judgments where the subject matter of the declaration is within equity jurisdiction. Jackson v. Smith, 236 Ark. 419, 366 S.W.2d 278 (1963); Sebastian County Ass'n for Retarded Citizens v. Board of Zoning Adjustment, 265 Ark. 175, 577 S.W.2d 394 (1979).

Courts of equity do not have jurisdiction to render declaratory judgments where the subject matter is not cognizable in a court of equity; nor may the parties wave the jurisdictional defect where there is no predicate or basis for equitable jurisdiction. City of N. Little Rock v. Gorman, 264 Ark. 150, 568 S.W.2d 481 (1978).

Where the subject matter is not subject to action by the chancery court, it has no jurisdiction to consider the petition for declaratory judgment. City of Garland v. Miller County, 270 Ark. 981, 606 S.W.2d 751 (1980); Daley v. Digby, 272 Ark. 267, 613 S.W.2d 589 (1981).

Where in an action for declaratory judgment, the complaint did not show that there was either a justifiable controversy or subject matter jurisdiction, the circuit court did not have jurisdiction to declare a statute unconstitutional. Arkansas Dep't of Human Servs. v. Ross-Lawhon, 290 Ark. 578, 721 S.W.2d 658 (1986).

This section does not confer subject-matter jurisdiction; there must be an independent basis for equitable jurisdiction before a chancery court can render a declaratory judgment. UHS of Ark., Inc. v. Charter Hosp., 297 Ark. 8, 759 S.W.2d 204 (1988).

Circuit courts and chancery courts are courts of equal power and dignity. Partlow v. Darling Store Fixtures, 314 Ark. 87, 858 S.W.2d 695 (1993).

If a chancery court has subject matter jurisdiction to decide a case under the Arkansas Constitution, the circuit court has no power to review that decision; thus, the circuit court was without jurisdiction to review a collateral administrative order defining the matter of paying child support issued by the chancery court. Partlow v. Darling Store Fixtures, 314 Ark. 87, 858 S.W.2d 695 (1993).

On appeal, the Arkansas Supreme Court has the power to reverse and remand with instruction to transfer between chancery and circuit courts. Partlow v. Darling Store Fixtures, 314 Ark. 87, 858 S.W.2d 695 (1993).

As circuit courts have exclusive jurisdiction over criminal prosecutions, an action seeking a declaration that the criminal sodomy statute is unconstitutional could only be heard in the circuit court. Bryant v. Picado, 338 Ark. 227, 996 S.W.2d 17 (1999).

Justiciable Controversy.

Declaratory Judgment Act does not require actual litigation as a prerequisite to asking for a declaratory judgment, but, as a general rule, litigation must be pending or threatened. Jessup v. Carmichael, 224 Ark. 230, 272 S.W.2d 438 (1954).

An attorney seeking fees for a worker's compensation suit to be based on a percentage of the medical payments made by an employer and his insurer, even though the full amount of payments was not yet known, could not obtain a declaratory judgment if he had not exhausted his administrative remedies. Ragon v. Great Am. Indem. Co., 224 Ark. 387, 273 S.W.2d 524 (1954).

The Declaratory Judgment Act is not intended to allow any question to be presented by any person; rather, a justiciable controversy must exist. Andres v. First Ark. Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959); Traveler's Indem. Co. v. Olive's Sporting Goods, Inc., 25 Ark. App. 81, 753 S.W.2d 284 (1988), rev'd on other grounds, 297 Ark. 516, 764 S.W.2d 596 (1989).

Suit for declaratory judgment as to constitutionality of statutes presents a justiciable controversy. Bennett v. NAACP, 236 Ark. 750, 370 S.W.2d 79 (1963); Coley v. Clinton, 479 F. Supp. 1036 (E.D. Ark. 1979), modified on other grounds, 635 F.2d 1364 (8th Cir. 1980).

A declaration of law in a separate and independent action when a justiciable controversy exists, in anticipation of future litigation, would be proper and the judgment appealable, but declaratory re-

lief is not proper when the identical questions involved in the declaratory judgment proceeding are already at issue between the parties in a pending action. Boyett v. Boyett, 269 Ark. 36, 598 S.W.2d 86 (1980).

Sufficiency of Complaints.

In declaratory judgment action wherein plaintiff sought judgment declaring her right to make such use of her lot as would prevent surface water from flowing across it from lands of defendants where some defendants stated they would hold her liable in damages if she interfered with the drainage of the water, chancellor did not abuse his discretion in dismissing the petition where it appeared that persons other than the named defendants might be damaged by her action and where it did not appear in detail just what action she proposed or what the probable damage to defendants and others might be. Jessup v. Carmichael, 224 Ark. 230, 272 S.W.2d 438 (1954).

The criteria for a declaratory judgment were met where, although neither complaint used the words "declaratory judgment," the effect of the complaints was to request that the court "declare rights, status, and other legal relations." Equity Gen. Agents, Inc. v. O'Neal, 15 Ark. App. 302, 692 S.W.2d 789 (1985).

Declaratory relief was not available where the plaintiff did not seek a declaration of his rights under the terms of an insurance contract, but, instead, alleged that a misrepresentation of the insurance contract terms was made in 1984 and that as a consequence of that misrepresentation, he wais entitled to have the contract of insurance reformed to conform with the representations made to him at that time. Martin v. Equitable Life Assurance Soc'y of the United States, 344 Ark. 177, 40 S.W.3d 733 (2001).

Writ of Habeas Corpus.

A writ of habeas corpus is issued in a criminal case only when the prisoner is being detained without lawful authority. Waddle v. Sargent, 313 Ark. 539, 855 S.W.2d 919 (1993).

Where the judgment of conviction and order of commitment were void, but where the petitioner remained charged with capital murder, the granting of a writ of habeas corpus did not mean that the petitioner had to be set free; the prisoner was released from the Arkansas Department of Correction and placed in the custody of the county sheriff to be held on the charge of capital murder. Waddle v. Sargent, 313 Ark. 539, 855 S.W.2d 919 (1993).

Cited: White v. Thornbrough, 229 Ark. 96, 313 S.W.2d 384 (1958); United States Fid. & Guar. Co. v. Downs, 230 Ark. 77, 320 S.W.2d 765 (1959); Watson v. Jones, 233 Ark. 203, 343 S.W.2d 415 (1961); Faubus v. Miles, 237 Ark. 957, 377 S.W.2d 601 (1964); American Television Co. v. City of Fayetteville, 253 Ark. 760, 489 S.W.2d 754 (1973); Millers Cas. Ins. Co. v. Murphy, 254 Ark. 956, 497 S.W.2d 15 (1973); Coley v. Clinton, 635 F.2d 1364 (8th Cir. 1980); Capehart-Creager Enters., Inc. v. O'Hara & Kendall Aviation, Inc., 543 F. Supp. 259 (W.D. Ark. 1982); Worthen v. Dillard, 275 Ark. 132, 628 S.W.2d 7 (1982); Stephenson v. Whittington, 6 Ark. App. 4, 636 S.W.2d 878 (1982); Bankers & Shippers Ins. Co. v. Kildow, 9 Ark. App. 86, 654 S.W.2d 600 (1983); Integon Life Ins. Co. v. Vandegrift, 11 Ark. App. 270, 669 S.W.2d 492 (1984); Murphy v. Epes, 283 Ark. 517, 678 S.W.2d 352 (1984); Webb v. Workers' Comp. Comm'n, 286 Ark. 399, 692 S.W.2d 233 (1985); Lawson v. City of Mammoth Spring ex rel. Smith, 287 Ark. 12, 696 S.W.2d 712 (1985); Lancaster v. Fitzhugh, 310 Ark. 590, 839 S.W.2d 192 (1992).

16-111-104. Right to determination generally.

Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

History. Acts 1953, No. 274, § 2; 1957, No. 35, § 1; A.S.A. 1947, § 34-2502.

CASE NOTES

Analysis

In general.
Affected by statutes.
Insurance contracts.
Municipal annexation.
Municipal ordinances.

In General.

While this section recognizes a party's right to a declaratory judgment, a justiciable controversy is required. Mastin v. Mastin, 316 Ark. 327, 871 S.W.2d 585 (1994).

All four elements for declaratory relief were met and the action was improperly dismissed for the customer's failure to join her daughter where the customer sought a determination of her obligation for unauthorized charges by the daughter on a charge account, as: (1) there was a justiciable controversy; (2) the controversy existed between two parties having adverse interests; (3) the customer claimed the customer did not owe for the charges; and (4) the issue was ripe for adjudication because the store continued to pursue recovery of the debt from the customer. Wilmans v. Sears, Roebuck & Co., 355 Ark. 668, 144 S.W.3d 245 (2004).

Affected by Statutes.

Insurance company has a right to use the declaratory judgment proceeding to have determined its duty to pay or defend where it questions whether the policy covers the situation out of which the injury arose. Equity Mut. Ins. Co. v. Southern Ice Co., 232 Ark. 41, 334 S.W.2d 688 (1960).

Under this section, an independent candidate for office could have had a judicial determination of the constitutionality of a statute before paying the filing fee provided therein, and having failed to do so and paid the fee voluntarily, he could not raise the question after his defeat in the general election by an action for refund of the fee. County of Searcy v. Stephenson, 244 Ark. 54, 424 S.W.2d 369 (1968).

Mandamus was not the proper remedy where a petitioner was seeking an order for the Alcoholic Beverage Control Board to rescind and void all permits issued to private clubs pursuant to statute for the dispensing of alcoholic beverages, because the constitutionality of the statute could be determined in a proceeding for declaratory judgment and because the petitioner was attempting to enforce an alleged duty which was not a plain ministerial duty for which a writ of mandamus could issue. Kemp-Bradford VFW Post 4764 v. Wood, 262 Ark. 168, 554 S.W.2d 344 (1977).

Defendant, who was convicted in a municipal court and filed suit for declaratory judgment that the legislation creating the court was unconstitutional and that his conviction was void had standing to bring the action as a person whose rights were affected by the legislation. Lawson v. City of Mammoth Spring ex rel. Smith, 287 Ark. 12, 696 S.W.2d 712 (1985).

Section 25-15-212 unconstitutionally deprives inmates of review of constitutional questions, because judicial review of all other administrative questions may be granted, or withheld, according to the Legislature's discretion. Clinton v. Bonds, 306 Ark. 554, 816 S.W.2d 169 (1991).

A municipal corporation had standing to challenge the constitutionality of a statute which permitted a landowner or group of landowners to have their land detached from a municipality and annexed to another municipality in order to obtain additional municipal services where that was once a part of its borders has now been annexed by a neighboring city pursuant to the statute. City of Cave Springs v. City of Rogers, 343 Ark. 652, 37 S.W.3d 607 (2001).

Insurance Contracts.

Insurance contracts come within the purview of the declaratory judgment statute. Equity Mut. Ins. Co. v. Southern Ice Co., 232 Ark. 41, 334 S.W.2d 688 (1960).

There is no law authorizing a declaratory judgment to be sought by a third party; the insured is the only one that can seek such a judgment. Nall v. Scott, 233 Ark. 21, 342 S.W.2d 418 (1961).

A declaratory judgment action rendered against the insured in favor of the insurer while the plaintiff injured party has an action pending against the insured is not

res judicata when the plaintiff exhausts his remedies against the insured and sues the insurance company where the plaintiff was not a party to the declaratory judgment action. Southern Farm Bureau Cas. Ins. Co. v. Robinson, 236 Ark. 268, 365 S.W.2d 454 (1963).

Where corporation had entered into contract with insurance agent to provide liability coverage for a premium, the agent had acted negligently in failing to obtain the coverage, causing the corporation to incur legal expenses which would continue unless the rights of the parties were settled, chancery court had jurisdiction to enter declaratory judgment determining the rights and duties of the parties. Priddy v. Mayer Aviation, Inc., 260 Ark. 3, 537 S.W.2d 370 (1976).

Where there exists a justiciable controversy in which an insurance policyholder is vitally concerned with the number of "occurrences" and amount of his aggregate coverage, a declaratory judgment action is proper. Traveler's Indem. Co. v. Olive's Sporting Goods, Inc., 297 Ark. 516, 764 S.W.2d 596 (1989).

Municipal Annexation.

A city in which property was originally located had standing to argue that another city which annexed the property did not meet the requirements of the annexation statute, § 14-40-2002, as the issue of whether the property remained a part of the first city depended upon whether the second city met its obligations under the annexation statute. City of Lowell v. City of Rogers, 345 Ark. 33, 43 S.W.3d 742 (2001).

Municipal Ordinances.

Petition for declaratory judgment was not outside jurisdiction of chancery court, where it was alleged that city ordinance amendment was unconstitutional in that it deprived petitioners of their property without due process of law or adequate compensation. American Television Co. v. City of Fayetteville, 253 Ark. 760, 489 S.W.2d 754 (1973), cert. denied, 466 U.S. 959, 104 S. Ct. 2172, 80 L. Ed. 2d 555 (1984).

Cited: Roberts v. Watts, 263 Ark. 822, 568 S.W.2d 1 (1978); Bankers & Shippers Ins. Co. v. Kildow, 9 Ark. App. 86, 654 S.W.2d 600 (1983); City of Jacksonville v. Martin, 286 Ark. 288, 692 S.W.2d 226 (1985); Lancaster v. Fitzhugh, 310 Ark. 590, 839 S.W.2d 192 (1992); Stilley v. James, 345 Ark. 362, 48 S.W.3d 521 (2001); Stilley v. James, 347 Ark. 74, 60 S.W.3d 410 (2001); Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002).

16-111-105. Right to determination in administration of trust or estate.

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

History. Acts 1953, No. 274, § 3; A.S.A. 1947, § 34-2503.

16-111-106. Parties.

(a) When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

(b) In any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

History. Acts 1953, No. 274, § 10; A.S.A. 1947, § 34-2510.

RESEARCH REFERENCES

UALR L.J. Hardin, Survey of Arkansas Law: Public Law, 2 UALR L.J. 281.

Survey — Constitutional Law, 12 UALR L.J. 161.

CASE NOTES

Analysis

In general.
Purpose.
Adversarial proceeding.
Attorney general.
Municipalities.
Parties in interest.

In General.

Although appellant did argue his constitutional claim to the trial court, the record did not reveal that either the Attorney General was notified of the state's right to be represented in the proceeding, or that the issues were otherwise adequately argued or briefed by truly adversarial parties. Therefore, the constitutional challenge would not be considered on appeal. Reagan v. City of Piggott, 305 Ark. 77, 805 S.W.2d 636 (1991).

This section did not require notice to the Attorney General in order to challenge rules promulgated by the appellate court; the statute specifically listed statutes, ordinances, and franchises, but made no mention of rules and was not applicable. Smith v. Sidney Moncrief Pontiac, Buick, GMC Co., 353 Ark. 701, 120 S.W.3d 525 (2003).

Although there was nothing in the record to indicate that the real property owner complied with subsection (b), which required notice to the Attorney General of the real property owner's challenge to the constitutionality of § 26-37-301, the Supreme Court of Arkansas addressed the real property owner's constitutional challenge because the record indicated that the arguments were fully developed before the trial court. Tsann Kuen Enters. Co. v. Campbell, 355 Ark. 110, 129 S.W.3d 822 (2003).

Purpose.

Purpose of the notice requirement is to prevent a statute from being declared unconstitutional in a proceeding which might not be a fully adversary and complete adjudication. Prater ex rel. Estate of Prater v. St. Paul Ins. Co., 293 Ark. 547, 739 S.W.2d 676 (1987).

Since the constitutional arguments were not fully developed before the trial court, a decision on the merits would have circumvented the purpose of the notice requirement. Arkansas Dep't of Human Servs. v. Heath, 307 Ark. 147, 817 S.W.2d 885 (1991).

Adversarial Proceeding.

The appellate court did not consider the constitutionality of the public service penalty in § 5-65-306 because the appellate court will not strike down a legislative act on constitutional grounds without first having the benefit of a fully developed adversarial case. Drummond v. State, 320 Ark. 385, 897 S.W.2d 553 (1995).

Attorney General.

The purpose of the notice requirement is to prevent an ordinance or statute from being declared unconstitutional in a proceeding which might not be a fully adversary and complete adjudication. City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2464, 77 L. Ed. 2d 1344 (1983).

Since this section requires service on the Attorney General, but does not require him to appear or to be made a party, the requirement of service is not jurisdictional; therefore, even though noncompliance with the notice requirement is generally reversible error, reversal is not mandated by this section. City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2464, 77 L. Ed. 2d 1344 (1983).

In action by tax payers seeking to declare invalid ordinances, the chancellor erred in not requiring that the Attorney General be given notice and an opportunity to be heard; however, since all points were exhaustively briefed and argued by city attorneys, such error was not prejudicial. City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2464, 77 L. Ed. 2d 1344 (1983).

Trial court erred in not requiring that Attorney General be served with notice of proceeding and be given an opportunity to be heard. Prater ex rel. Estate of Prater v. St. Paul Ins. Co., 293 Ark. 547, 739 S.W.2d 676 (1987); Olmstead v. Logan, 298 Ark. 421, 768 S.W.2d 26 (1989).

Failure to notify the Attorney General was not grounds for reversal where there had been a full adjudication of the issue, the Attorney General was a party at the hearing and even submitted a brief. Carney v. State, 305 Ark. 431, 808 S.W.2d 755 (1991).

Where plaintiff notified the Attorney General of her constitutional challenge within the allotted period under subsection (b) of this section, but failed to pursue the issue further, neither filing motions with the trial court on the question nor requesting a ruling on her previous challenge, the trial court never ruled on the constitutional issue; the burden of obtaining a ruling is on the movant, and matters left unresolved are waived any may not be raised on appeal. Parmley v. Moose, 317 Ark. 52, 876 S.W.2d 243 (1994).

Where no notice of appellant's constitutional challenge was given to the Attorney General pursuant to this section, the appellate court could choose not to consider the argument on appeal. Brumley v. Naples, 320 Ark. 310, 896 S.W.2d 860 (1995).

In a termination of parental rights case, the appellate court declined to consider a mother's constitutional challenge because it was not preserved for appellate review; moreover, the mother failed to give proper notice to the Arkansas Attorney General. Maxwell v. Ark. Dep't of Human Servs., — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 228 (Mar. 9, 2005).

Municipalities.

In action seeking to establish the validity of a municipal ordinance where necessary parties are not made parties to the suit, a declaratory judgment should not be rendered. Laman v. Martin, 235 Ark. 938, 362 S.W.2d 711 (1962).

Counties, cities, and towns are municipal corporations within the meaning of this section. Roberts v. Watts, 263 Ark. 822, 568 S.W.2d 1 (1978).

Where challenged ordinances levied privilege tax against waterworks commission, which was therefore technically a necessary party to taxpayers' suit, but the ordinance passed on the tax to the consumer so that the waterworks was merely a conduit for the city, there was no prejudice to any of the parties as a result of failure to require the operating authority of the waterworks and its commissioners to be made parties. City of Little Rock v. Cash, 277 Ark. 494, 644 S.W.2d 229 (1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2464, 77 L. Ed. 2d 1344 (1983).

Parties in Interest.

For the purposes of removal, federal law determines who is plaintiff and who is defendant; it is a question of construction of the federal statute on removal and not the state statute, and the state's procedural provisions cannot control the privilege of removal granted by federal statute. Mitchell v. Southern Farm Bureau Cas. Ins. Co., 192 F. Supp. 819 (W.D. Ark. 1961).

A suit brought by a voter seeking a declaratory judgment as to whether the senate should be divided into two classes

by lot was fatally defective when only the five senators from the voter's senatorial district were named parties defendant, it being necessary under this section to name all senators parties defendant. Block v. Allen, 241 Ark. 970, 411 S.W.2d 21 (1967).

Where all the objectors to a petition are residents of the same residential zone or district where the petitioner's property is located, it is not error for the chancellor to restrict his decree to such zone or district. Arkansas Release Guidance Found. v. Hummel, 245 Ark. 953, 435 S.W.2d 774 (1969).

Where a voter brought a class action for a declaratory judgment to have an election set aside, but neither the unsuccessful election contestant nor the election winner was made a party to the action, the failure to include the election contestants was fatal to the declaratory judgment action, since their interest would certainly have been affected by the outcome of the action. Files v. Hill, 268 Ark. 106, 594 S.W.2d 836 (1980).

Where all necessary parties have not been brought into court, the trial court should refuse under § 16-111-108 to render a declaratory judgment in the case. Board of Educ. v. Ozark Sch. Dist., 2 Ark. App. 112, 619 S.W.2d 304 (1981).

Complete relief could not be afforded without making the guardian of a lifetime beneficiary and the remainder beneficiaries parties to an action; consequently, chancellor erred in exercising jurisdiction because the guardian and the remaindermen could later raise identical issues, and thus, there would be no termination of the uncertainty or controversy. Yamauchi v. Sovran Bank/Central S., 309 Ark. 532, 832 S.W.2d 241 (1992).

A declaratory judgment action by a candidate for public office and a registered voter seeking a declaration that the candidate was the winner of a Democratic Party primary election was nonjusticiable where neither the Secretary of State nor the state Democratic Committee were joined as parties in the action. Willis v. Circuit Court of Philips County, 342 Ark. 128, 27 S.W.3d 372 (2000).

Cited: Cairns v. Witt, 242 Ark. 735, 415 S.W.2d 47 (1967); Pulaski County Mun. Court v. Scott, 272 Ark. 115, 612 S.W.2d 297 (1981); Handy Dan Imp. Ctr., Inc. v. Adams, 276 Ark. 268, 633 S.W.2d 699 (1982); Equity Gen. Agents, Inc. v. O'Neal, 15 Ark. App. 302, 692 S.W.2d 789 (1985); Lawson v. City of Mammoth Spring ex rel. Smith, 287 Ark. 12, 696 S.W.2d 712 (1985); City of Star City v. Shepherd, 287 Ark. 188, 697 S.W.2d 113 (1985); Cummings v. City of Fayetteville, 294 Ark. 151, 741 S.W.2d 638 (1987); Spires v. Members of Election Comm'n, 302 Ark. 407, 790 S.W.2d 167 (1990); Arkansas Dep't of Human Servs. v. Heath, 312 Ark. 206, 848 S.W.2d 927 (1993); Davis v. Child Support Enforcement Unit, 326 Ark. 677, 933 S.W.2d 798 (1996); Oliver v. Washington County, 328 Ark. 61, 940 S.W.2d 884 (1997); Beulah v. State, 352 Ark. 472, 101 S.W.3d 802 (2003); Landers v. Jameson, 355 Ark. 163, 132 S.W.3d 741 (2003).

16-111-107. Jury trial.

When a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

History. Acts 1953, No. 274, § 8; A.S.A. 1947, § 34-2508.

CASE NOTES

Cited: American Television Co. v. City of Fayetteville, 253 Ark. 760, 489 S.W.2d 754 (1973).

16-111-108. Refusal to render judgment or decree.

The court may refuse to render or enter a declaratory judgment or decree where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

History. Acts 1953, No. 274, § 5; A.S.A. 1947, § 34-2505.

CASE NOTES

Analysis

Pending federal action.
Parties not included.

Pending Federal Action.

Trial court did not err in dismissing a declaratory judgment action on the ground that the issues present in a city's declaratory-judgment suit against a telecommunications company would be determined in a federal case that the telecommunications company was preparing to file between the parties in federal court; further, the state court action might not have resolved all the issues between the parties. City of Fort Smith v. Didicom Towers, Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 348 (June 2, 2005).

Parties Not Included.

Where all of the parties with an interest in the election that would be affected were not parties to the action, a declaratory judgment voiding election was properly refused as it would actually complicate the controversy rather than terminate it. McFarlin v. Kelly, 246 Ark. 1237, 442 S.W.2d 183 (1969).

Where all necessary parties have not been brought into court, the trial court should refuse to render a declaratory judgment in the case. Board of Educ. v. Ozark Sch. Dist., 2 Ark. App. 112, 619 S.W.2d 304 (1981).

Cited: Cairns v. Witt, 242 Ark. 735, 415 S.W.2d 47 (1967); American Television Co. v. City of Fayetteville, 253 Ark. 760, 489 S.W.2d 754 (1973); Yamauchi v. Sovran Bank/Central S., 309 Ark. 532, 832 S.W.2d 241 (1992).

16-111-109. Review.

All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

History. Acts 1953, No. 274, § 6; A.S.A. 1947, § 34-2506.

CASE NOTES

In General.

Judgment of circuit court in declaratory judgment proceeding is reviewed in same manner as any other judgment, and if there is any substantial evidence to support finding upon which the judgment is based, it will be affirmed. Mid-South Ins. Co. v. Dellinger, 239 Ark. 169, 388 S.W.2d 6 (1965); Commercial Printing Co. v. Rush, 261 Ark. 468, 549 S.W.2d 790 (1977).

Cited: American Television Co. v. City of Fayetteville, 253 Ark. 760, 489 S.W.2d 754 (1973).

16-111-110. Supplementary relief.

(a) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.

(b) The application therefor shall be by petition to a court having jurisdiction to grant the relief.

(c) If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

History. Acts 1953, No. 274, § 7; A.S.A. 1947, § 34-2507.

16-111-111. Costs.

In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.

History. Acts 1953, No. 274, § 9; A.S.A. 1947, § 34-2509.

CASE NOTES

Costs Denied.

Trial court did not err in denying a telecommunications company's motion for costs following the dismissal of a city's declaratory judgment action against the company because there was no resolution on the merits of the action; rather, it was merely dismissed because a similar action was pending in federal court, which the trial court believed would determine the issues between the parties. City of Fort Smith v. Didicom Towers, Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 348 (June 2, 2005).

Cited: Mid-South Ins. Co. v. Dellinger, 239 Ark. 169, 388 S.W.2d 6 (1965).

CHAPTER 112

HABEAS CORPUS

SUBCHAPTER.

1. Appeals — New Scientific Evidence.
2. Other Relief — New Scientific Evidence.

Cross References. Habeas corpus, Ark. Const., Art. 2, § 11.

Jurisdiction of Supreme Court, Ark. Const., Art. 7, § 4.

Power of county judge during absence of circuit judge, Ark. Const., Art. 7, § 37.

Effective Dates. Acts 1875, No. 100, § 3: effective on passage.

Acts 1877, No. 2, § 2: effective on passage.

Acts 1883, No. 93, § 2: effective on passage.

RESEARCH REFERENCES

ALR. Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR 4th 582.

Am. Jur. 39 Am. Jur. 2d, Hab. Corp., § 1 et seq.

Ark. L. Rev. Post-Conviction Relief in Arkansas, 24 Ark. L. Rev. 57.

C.J.S. 39 C.J.S., Hab. Corp., § 1 et seq.

Subchapter 1 — Appeals — New Scientific Evidence

SECTION.
16-112-101. Procedure.
16-112-102. Officers permitted to issue.
16-112-103. Petition.
16-112-104. Bond prior to issuance of writ.
16-112-105. Form of writ.
16-112-106. Service of writ.
16-112-107. Removal from county within 15 days of term of certain court prohibited — Exception.
16-112-108. Return.
16-112-109. Information relating to commitment.
16-112-110. Failure to produce petitioner.
16-112-111. Order to produce petitioner.
16-112-112. Failure to produce person because of sickness or infirmity.
16-112-113. Denial, allegations, and amendment of return.
16-112-114. Witnesses.
16-112-115. Discharge, remand, admission to bail, or other order — Costs.
16-112-116. Remand generally.
16-112-117. Admission to bail or remand.
16-112-118. Discharge.
16-112-119. Return of proceedings.
16-112-120. Subsequent imprisonment or commitment prohibited — Exceptions.
16-112-121. Second writ.
16-112-122. Issuance of writ by judge without application.
16-112-123. Writ in nature of summary habeas corpus.

16-112-101. Procedure.

The writ of habeas corpus shall be issued, served, and tried in the manner prescribed in this chapter.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5075; Pope's Dig., § 6338; A.S.A. 1947, § 34-1701.

CASE NOTES

Analysis

Hearing.
Scope of writ.

Hearing.

There is no requirement that a habeas corpus hearing be given any petitioner regardless of the content of the petition. George v. State, 285 Ark. 84, 685 S.W.2d 141 (1985).

Scope of Writ.

The writ of habeas corpus cannot be used as a substitute for an appeal or writ of error. State ex rel. Ark. Indus. Co. v. Neel, 48 Ark. 283, 3 S.W. 631 (1886); Ex parte Brandon, 49 Ark. 143, 4 S.W. 452 (1886); Ex parte Barnett, 51 Ark. 215, 10 S.W. 492 (1888); State ex rel. Burrow v. Cross, 55 Ark. 275, 18 S.W. 170 (1892); Ex parte Foote, 70 Ark. 12, 65 S.W. 706 (1901).

Validity of judgment of conviction for violating a statute can be tested only by appeal. State ex rel. Att'y Gen. v. Byles, 93 Ark. 612, 126 S.W. 94, writ of error dism., 225 U.S. 717, 32 S. Ct. 836, 56 L. Ed. 1270 (1910).

The action of a chief of police in refusing bail for insufficient sureties is not reviewable on habeas corpus. Ex parte Johnston, 99 Ark. 201, 137 S.W. 803 (1911).

The habeas corpus writ is granted only when a person is detained without lawful authority or imprisoned when by law he or she is entitled to bail. Kozal v. Board of Cor., 310 Ark. 648, 840 S.W.2d 164 (1992).

Ineffective assistance of counsel claims are not cognizable by habeas corpus. McConaughy v. Lockhart, 310 Ark. 686, 840 S.W.2d 166 (1992).

A writ of habeas corpus will not issue to correct errors or irregularities that occurred at trial. McConaughy v. Lockhart, 310 Ark. 686, 840 S.W.2d 166 (1992).

Writ of habeas corpus would issue when a commitment was invalid on its face or when the sentencing court lacked jurisdic-

tion to enter or modify the sentence; the trial court, not the juvenile court, had jurisdiction and the mere detention of defendant in a juvenile facility did not give the juvenile court jurisdiction such that, because no juvenile proceedings had commenced against defendant, the trial court acquired jurisdiction over the criminal proceedings initiated against him upon the filing of the information charging him as an adult. Morgan v. Norris, 355 Ark. 678, 144 S.W.3d 243 (2004).

Cited: Prince v. Lockhart, 971 F.2d 118 (8th Cir. 1992), cert. denied, 507 U.S. 964, 113 S. Ct. 1394, 122 L. Ed. 2d 768 (1993).

16-112-102. Officers permitted to issue.

(a)(1) The writ of habeas corpus shall be issued upon proper application by a Justice of the Supreme Court or a judge of the circuit court. The power of the Supreme Court and circuit court to issue writs of habeas corpus shall be coextensive with the state.

(2)(A) The county judge shall have power coextensive with his or her county in the absence of the circuit judge therefrom to issue, hear, and determine writs of habeas corpus on proper application of parties entitled thereto, in all cases and with like powers, in which the circuit judge may issue and determine a writ of habeas corpus.

(B) However, no county judge shall have power to issue or hear any writ of habeas corpus in any case in which an indictment has been found by a grand jury.

(b) If any officer enumerated in subsection (a) of this section shall, when legally applied to, refuse to issue the writ of habeas corpus to the petitioner, he or she shall forfeit and pay to the petitioner five hundred dollars ($500).

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; 1875, No. 100, § 1, p. 219; 1877, No. 2, § 1, p. 1; 1883, No. 93, § 1, p. 170; C. & M. Dig., §§ 5084, 5093; Pope's Dig., §§ 6347, 6356; A.S.A. 1947, §§ 34-1702, 34-1707; Acts 2003, No. 1185, § 232.

Amendments. The 2003 amendment, in (a)(1), deleted "or a judge of any chancery court during the sitting of their respective courts or in vacation" from the end of the first sentence and substituted "Supreme Court and circuit court" for "Supreme Court, circuit, or chancery courts" in the second sentence.

CASE NOTES

Analysis

Coextensive power.
Jurisdiction.
—Circuit judges.
—County judges.
—Supreme court.
Parties.
Review.

Coextensive Power.

Under this section a court's power to issue writs of habeas corpus is coextensive with the state and is not limited by § 16-60-103 concerning the venue of actions against state officers. State Dep't of Pub. Welfare v. Lipe, 257 Ark. 1015, 521 S.W.2d 526 (1975).

Jurisdiction.

The scope of inquiry for a writ of habeas corpus when a petitioner is in custody under process regular on its face is limited to the jurisdiction of the court from where the process came. Mitchell v. State, 233 Ark. 578, 346 S.W.2d 201 (1961).

—Circuit Judges.

The jurisdiction of a circuit judge is coextensive with the state. State ex rel. Att'y Gen. v. Stevenson, 89 Ark. 31, 116 S.W. 202 (1909).

—County Judges.

Supreme Court will not review action of county judge who, in absence of circuit judge, denies the writ. Ex parte Dame, 162 Ark. 382, 259 S.W. 754 (1923).

—Supreme Court.

Where there is no subordinate court competent to issue the writ, the Supreme Court will award it. Ex parte Robins, 15 Ark. 402 (1855); Ex parte Good, 19 Ark. 410 (1858); Ex parte Kittrel, 20 Ark. 499 (1859); State ex rel. Att'y Gen. v. Williams, 97 Ark. 243, 133 S.W. 1017 (1911).

Parties.

Upon habeas corpus to procure a petitioner's release from imprisonment for contempt of court, the only parties entitled to be heard are the applicant for the writ and the officer having him in custody, unless it be the state. Ex parte Boles, 88 Ark. 388, 114 S.W. 918 (1909).

Review.

The Supreme Court has jurisdiction to review the proceedings of inferior courts and of judges and chancellors at chambers, upon applications for writs of habeas corpus, and the proceedings thereon. Ex parte Jackson, 45 Ark. 158 (1885); State ex rel. Ark. Indus. Co. v. Neel, 48 Ark. 283, 3 S.W. 631 (1886); State ex rel. Att'y Gen. v. Williams, 97 Ark. 243, 133 S.W. 1017 (1911).

One who was not a party to a habeas corpus proceeding before a chancellor is not entitled to apply for a writ of certiorari to review the chancellor's finding. Ex parte Boles, 88 Ark. 388, 114 S.W. 918 (1909).

The proper method of bringing up proceedings on habeas corpus for review is by means of a writ of certiorari. Taylor v. Moore, 99 Ark. 412, 138 S.W. 634 (1911).

The proper method of bringing up for review the actions of inferior courts or judges in proceeding for habeas corpus is by certiorari and not by appeal; yet where the Attorney General representing the state concedes that the record is correct and has agreed that a case on appeal may be heard as if a petition for certiorari has been duly presented and the record brought up for review in obedience to the writ issued thereon, the cause will be so considered. Ex parte Holdaway, 105 Ark. 1, 150 S.W. 123 (1912).

Where a juvenile was not provided with defense counsel at the hearing finding him in criminal contempt and in violation of his Division of Youth Services aftercare plan, the juvenile's due process rights were violated, the trial court's order commitment order was invalid, and the juvenile's petition for a writ of habeas corpus was granted. Ark. Dep't of Human Servs. v. Mainard, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 421 (June 24, 2004).

Cited: Simpson v. Sheriff of Dallas County, 333 Ark. 277, 968 S.W.2d 614 (1998).

16-112-103. Petition.

(a)(1) The writ of habeas corpus shall be granted forthwith by any of the officers enumerated in § 16-112-102(a) to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority, is imprisoned when by law he or she is entitled to bail, or who has alleged actual innocence of the offense or offenses for which the person was convicted.

(2) The procedures for persons who allege actual innocence shall be in accordance with § 16-112-201 et seq.

(b)(1) The writ of habeas corpus shall be granted upon the application, and in the name of the father, mother, guardian, or next friend of any married woman or infant, against any person who shall unlawfully have or detain in custody or bondage any infant or married woman.

(2) Similar proceedings shall be had for hearing and determining the cause and affording the relief demanded as in other cases.

(c) Writs of habeas corpus shall issue upon the application of the husband, father, mother, guardian, or next friend of any married woman or infant detained by any religious or other association or by persons acting under the authority of the association. The prosecuting attorney, where the detention is made, shall prosecute the writ without fee, if required to do so.

(d) If the restraint or confinement is by virtue of any warrant, order, or process, a copy thereof must accompany the petition, or it must appear by affidavit annexed thereto, showing that by reason of the person being concealed before the application, a demand of the copy could not be made, or that the demand was made of the person by whom the prisoner is confined or restrained, and a copy refused.

History. Rev. Stat., ch. 73, art. 1, § 5; Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., §§ 5086-5089; Pope's Dig., §§ 6349-6352; A.S.A. 1947, §§ 34-1703 — 34-1706; Acts 2001, No. 1780, § 3.

A.C.R.C. Notes. Acts 2001, No. 1780, § 1, provided: "The General Assembly finds that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further finds that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence."

Amendments. The 2001 amendment, in (a)(1), inserted "or she" and added "or who has alleged...was convicted"; and added (a)(2) and made related changes.

Cross References. Prisoner entitled to copy of warrant of commitment, § 16-90-406.

Removal of disabilities of married women, § 9-11-502.

Physical evidence in sex offense prosecutions — Retention and disposition, § 12-12-104.

RESEARCH REFERENCES

UALR L.J. Note, Criminal Procedure — Waiver of Appellate Review of Death Sentences In Arkansas; Standing — Capacity to Litigate Matters of Public Interest in Arkansas, Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988), 11 UALR L.J. 569.

Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

CASE NOTES

Analysis

Construction.
Capital offenses.
Denial of petition.
Detention without lawful authority.
Error in granting writ.
Right to maintain.
Sufficiency of petition.
—Infants.
—Probable cause.
—Warrant, order, or process.

Construction.

Because the legislature has declined several opportunities to amend this section in response to the court's interpretation that a writ of habeas corpus will issue only if the commitment was invalid on its face or the committing court lacked jurisdiction, the court's interpretation remains the law. Sawyer v. State, 327 Ark. 421, 938 S.W.2d 843 (1997).

Capital Offenses.

An indictment in a capital case does raise such a presumption against the defendant as to deprive him of the privilege of habeas corpus as a matter of right, so to be entitled to the writ he must rebut the presumption raised against him. Ex parte White, 9 Ark. 222 (1848) (decision under prior law).

Where there is no subordinate court competent to issue a writ of habeas cor-

pus, the Supreme Court will issue the writ. Ex parte Robins, 15 Ark. 402 (1855) (decision under prior law).

If the circuit court or judge refuse bail, the Supreme Court, upon proper showing of facts upon which the circuit judge acted, may award certiorari and bring him before it by habeas corpus and admit him to bail or direct the circuit judge to do so. Ex parte Good, 19 Ark. 410 (1858); Ex parte Bird & Bailey, 24 Ark. 275 (1866) (preceding decisions under prior law).

The circuit court has the exclusive jurisdiction to issue writs of habeas corpus and admit to bail in capital cases. Ex parte Kittrel, 20 Ark. 499 (1859) (decision under prior law).

Unless a manifest error in the circuit court appears, the Supreme Court will not reverse its refusal of bail. Ex parte Osborn, 24 Ark. 185 (1866) (decision under prior law).

Early decisions concerning habeas corpus in capital cases were not weakened by subsequent legislation, and the chancellor was without power to issue the writ or grant bail to a person under indictment for a capital offense; only the judge of the circuit court had such authority which could be exercised in term time or vacation. State ex rel. Att'y Gen. v. Williams, 97 Ark. 243, 133 S.W. 1017 (1911).

Denial of Petition.

Where relief sought in habeas corpus petition was of the kind that could be granted pursuant to former ARCrP 37 (see now ARCrP 37.1), the court properly refused to consider Rule 37 relief when it had already been sought and denied. Miller v. State, 301 Ark. 59, 781 S.W.2d 475 (1989).

Inmate sentenced to life imprisonment for rape by engaging in deviate sexual activity with his eight-year-old daughter was properly denied habeas relief; allegations that a juror had been improperly seated and that the Arkansas Rules of Evidence were improperly applied at trial were not sufficient to demonstrate that the commitment was invalid. Kilcrease v. State, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 379 (June 16, 2005).

Detention Without Lawful Authority.

The court could not say that the circuit judge's contempt order was invalid on its face or that the judge lacked jurisdiction to enter the order where the circuit court held two prosecuting attorneys in contempt and incarcerated them after they refused to proceed with the jury trial in a criminal case. Johnson v. Johnson, 343 Ark. 186, 33 S.W.3d 492 (2000).

Where a juvenile was not provided with defense counsel at the hearing finding him in criminal contempt and in violation of his Division of Youth Services aftercare plan, the juvenile's due process rights were violated, the trial court's order commitment order was invalid, and the juvenile's petition for a writ of habeas corpus was granted. Ark. Dep't of Human Servs. v. Mainard, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 421 (June 24, 2004).

Error in Granting Writ.

Where defendant was committed to an alcohol treatment facility pursuant to former § 20-64-709 (see now § 20-64-801 et seq.) and was unable to make her appeal bond, circuit court erred in granting defendant's writ of habeas corpus as defendant was not detained without lawful authority, or imprisoned when by law she was entitled to bail, but had simply failed to make bond and did not petition to have bond reduced though represented by an attorney at all times. City of Clinton v. Jones, 302 Ark. 109, 787 S.W.2d 242 (1990).

Right to Maintain.

If, pending an appeal, the restriction is removed and the accused procures his release, he cannot thereafter maintain a proceeding previously begun for a writ of habeas corpus. Ex parte Rubly, 222 Ark. 423, 261 S.W.2d 4 (1953).

A writ of habeas corpus will not be issued as a substitute for post-conviction relief. Rather, the writ of habeas corpus will be issued only when the commitment is invalid on its face or the committing court lacked jurisdiction. Mackey v. Lockhart, 307 Ark. 321, 819 S.W.2d 702 (1991).

Sufficiency of Petition.

If petition for habeas corpus raises no question of jurisdiction of the trial court to try petitioner on the charges of which he was convicted, or as to the regularity of the commitment on which he was being held, the court can grant no relief in habeas corpus proceedings. State ex rel. Williams v. Auten, 211 Ark. 703, 202

S.W.2d 763 (1947); Miller v. State, 301 Ark. 59, 781 S.W.2d 475 (1989).

Where nothing was alleged in the petition that was not or could not have been raised on appeal in the first instance except the allegation of present insanity, defendant was not entitled to a writ of habeas corpus. Mitchell v. State, 233 Ark. 578, 346 S.W.2d 201 (1961).

—Infants.

In deciding contests upon writs of habeas corpus for the custody of infant children, the principles adopted in the chancery court must govern, and no rigid rules to govern the practice have been or can be formulated. Subject to a few general rules, to be taken as a guide, the chancellor must exercise his judgment upon the peculiar circumstances of the case, and act as humanity, respect for the parental affection, and regard for the infant's best interest may prompt; all three should be considered. Neither should be conclusive. Verser v. Ford, 37 Ark. 27 (1881).

On habeas corpus by the father to obtain custody, the proof tended to show that while he was a moral man and worthy to assume the education and control of his child, the advantages to an infant of tender years were with the "adoptive" family. Washaw v. Gimble, 50 Ark. 351, 7 S.W. 389 (1887).

Where there were no allegations of unfitness or findings of fitness of the child's mother or any other person, nor any hearing with respect to the best interest of the child, no previous order conferring custody of the child upon anyone and no delay on the part of the mother in seeking custody of her child, given the natural right of the parent to the custody of her child there was no basis for denial of mother's writ for the custody of her child. Bruce ex rel. Bruce v. Dillahunty, 293 Ark. 479, 739 S.W.2d 522 (1987).

—Probable Cause.

In a habeas corpus hearing, the question is whether there is a showing of probable cause that the petitioner is being detained unlawfully; one is held without lawful authority when it is shown the commitment is invalid on its face or the court lacked jurisdiction. George v. State, 285 Ark. 84, 685 S.W.2d 141 (1985).

A petition for writ of habeas corpus is restricted to the questions of whether the petitioner is in custody pursuant to a valid conviction and whether the convicting court had proper jurisdiction; a writ of habeas corpus is not a remedy for attacking parole decisions. Baker v. Lockhart, 288 Ark. 91, 702 S.W.2d 403 (1986).

—Warrant, Order, or Process.

A copy of the warrant, order, or process must accompany the petition, or a legal excuse be shown for the omission; for if the warrant, order, or process shows a valid and legal commitment, the application should be denied. In re Beard, 4 Ark. 9 (1842); Ex parte Royster, 6 Ark. 28 (1845).

Cited: Johnson v. State, 298 Ark. 479, 769 S.W.2d 3 (1989); Tate v. Sharpe, 300 Ark. 126, 777 S.W.2d 215 (1989); Meny v. Norris, 340 Ark. 418, 13 S.W.3d 143 (2000).

16-112-104. Bond prior to issuance of writ.

(a) The officer granting the writ may previously require bond, with surety, in sufficient penalty, payable to the state or to the person against whom the writ is directed, conditioned that the person detained shall not escape by the way, and for the payment of such costs and charges as may be awarded against him or her.

(b) The bond shall be filed with the other proceedings in the court and may be sued on by the state for the benefit of any person injured by the breach of it.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5096; Pope's Dig., § 6359; A.S.A. 1947, § 34-1708.

CASE NOTES

Analysis

Enforcement.
Liability.
Validity.

Enforcement.

A bond for the production of a child executed by a mother in a habeas corpus proceeding was held enforceable for the benefit of the father though the sheriff was named as obligee where the father was the party interested and the bond was made to protect him. State ex rel. Lee v. McMillin, 191 Ark. 96, 83 S.W.2d 57 (1935).

Liability.

Under a bond for the production of a child in court, the obligor's liability was limited to the amount stated in the bond and did not include attorney's fees. State ex rel. Lee v. McMillin, 191 Ark. 96, 83 S.W.2d 57 (1935).

Validity.

A bond executed in a habeas corpus proceeding for the production of a child was held a valid common law bond where its execution was not prohibited by statute nor contrary to public policy and was based on a sufficient consideration and entered into by competent parties. State ex rel. Lee v. McMillin, 191 Ark. 96, 83 S.W.2d 57 (1935).

16-112-105. Form of writ.

(a) Writs of habeas corpus may be granted without the seal of the officer but shall be signed by him or her.

(b)(1) The writ shall be directed to the person in whose custody the prisoner is detained, and made returnable as soon as may be, before the Supreme Court Justices, or before the circuit judges of the county in which it may be served, if either are within the county.

(2) The writ shall specify the time and place to which it shall be returned.

(c)(1) In a writ of habeas corpus the person having the custody of the prisoner may be designated either by his or her name of office, if he or she has any, or his or her own name. If both names are uncertain or unknown, he or she may be described by any assumed appellation.

(2) The person directed to be produced may be designated by his or her name. If his or her name is uncertain or unknown, he or she may be described in any other way so as to designate or identify the person intended.

(d) Writs of habeas corpus shall not be disobeyed for any defect of form. Anyone who shall be served therewith shall be deemed to be the person to whom it is directed, though it may be directed to him or her by a wrong name, or description, or to another person.

History. Rev. Stat., ch. 73, art. 1, §§ 10, 11; Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., §§ 5085, 5091, 5092, 5095; Pope's Dig., §§ 6348, 6354, 6355, 6358; A.S.A. 1947, §§ 34-1709 — 34-1712.

CASE NOTES

Person Having Custody.

In a habeas corpus action for a person detained in the Arkansas Children's Colony, the defendant should be the superintendent of the Arkansas Children's Colony and not the officers of the state department of public welfare nor the members of the board of mental retardation. State

Dep't of Pub. Welfare v. Lipe, 257 Ark. 1015, 521 S.W.2d 526 (1975).

16-112-106. Service of writ.

(a) The writ shall be served by any qualified officer or by any private individual designated by the judge on the person to whom it is directed or, in his or her absence from the place where the petitioner is confined, on the person having him or her in immediate custody.

(b) If the person upon whom the writ ought to be served conceals himself or herself or refuses admittance to the person attempting the service, it may be served by affixing a copy of the writ in some conspicuous place on the outside either of the dwelling house or jail, or place where the party is confined.

(c) Anyone having in his or her custody or under his or her power any person for whose relief a writ of habeas corpus shall have been issued or who is entitled to a writ of habeas corpus to inquire into the cause of his or her detention who shall transfer the person to the custody of another or place the person under the control or power of another, conceal the person, or change the place of the person's confinement with the intent to elude the service of the writ shall be guilty of a Class A misdemeanor and shall pay the party injured five hundred dollars ($500).

History. Rev. Stat., ch. 73, art. 2, § 2; Rev. Stat., ch. 73, art. 4, §§ 13, 16; Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., §§ 5097, 5098, 5108; Pope's Dig., §§ 6360, 6361, 6371; A.S.A. 1947, §§ 34-1713 — 34-1715; Acts 2005, No. 1994, § 225.

Amendments. The 2005 amendment inserted "or her" throughout this section; and substituted "Class A misdemeanor" for "misdemeanor. Upon conviction, he shall be fined in any sum not exceeding one thousand dollars ($1,000) or imprisoned not exceeding one (1) year, or punished by both fine and imprisonment" in (c).

16-112-107. Removal from county within 15 days of term of certain court prohibited — Exception.

No person charged with a criminal offense shall be removed by a writ of habeas corpus out of the county in which he or she is confined at any time within fifteen (15) days next preceding the term of the court at which the prisoner ought to be tried, except to convey him or her into the county where the offense with which he or she is charged is properly cognizable.

History. Rev. Stat., ch. 73, art. 4, § 6; C. & M. Dig., § 5116; Pope's Dig., § 6379; A.S.A. 1947, § 34-1716.

16-112-108. Return.

(a) The writ shall be made returnable within three (3) days after it is served. However, if the person is to be brought more than twenty (20) miles, the writ shall be made returnable within so many days more as

will be equal to one (1) day for every twenty (20) miles for the further distance. It shall be returned with the person of the petitioner, with the cause of his or her detention or his or her imprisonment stated in the return.

(b) The officer or other person serving the writ shall leave a copy with the person on whom it is served, upon which the cause of detention shall be stated, and return the original to the proper officer.

(c)(1) Every officer or other person upon whom a writ of habeas corpus shall be served shall state in his or her return plainly and unequivocally:

(A) Whether he or she has or has not the party in his or her custody or under his power or restraint;

(B) If he or she has the party in his or her custody or power or under his or her restraint, the authority and true cause of the imprisonment or restraint, setting forth the same at large;

(C) If the person making the return shall have had the party in his or her power or custody or under his or her restraint, at any time before the service of the writ, and has transferred the custody or possession to another, particularly to whom, at what time, for what cause, and by what authority the transfer took place.

(2) If the party is restrained, imprisoned, or detained by virtue of any writ, order, warrant, or other written authority, a copy thereof shall be annexed to the return. The original shall be exhibited on the return of the writ, to the court or judge to whom it is returnable.

(3) The return must be signed by the person making the return, and except where the person shall be a sworn officer and shall make his or her return in his or her official capacity, it shall be verified by his or her oath.

History. Rev. Stat. ch. 73, art. 2, §§ 7, 8; Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., §§ 5099, 5101-5103; Pope's Dig., §§ 6362, 6364-6366; A.S.A. 1947, §§ 34-1717 — 34-1719.

CASE NOTES

Jurisdiction.

In the absence of any request that the writ of habeas corpus be made returnable to the proper court, the chancellor correctly sustained the motion to quash where the judge of the Pulaski Chancery Court, while having the power to issue the writ of habeas corpus, did not have the power to make it returnable before himself or to determine the custody issue raised in the petition where the real parties defendant were residents of a county in another chancery district. Johnson v. McClure, 228 Ark. 1081, 312 S.W.2d 347 (1958).

16-112-109. Information relating to commitment.

(a) When the party for whose relief a writ of habeas corpus has been issued shall stand committed for any criminal or supposed criminal matter, it shall be the duty of the officer or person upon whom the writ is served to bring with the writ all and every examination and

information in his or her hands, possession, custody, or charge, relating to the commitment.

(b) If no examination shall accompany the commitment nor be in the possession of the officer having the prisoner in custody, the officer shall exhibit the habeas corpus, when served on him or her, to the judge or magistrate by whom the prisoner was committed or the clerk of the court if the papers are in his or her office. It shall be the duty of the judge, magistrate, or clerk to deliver to the officer having the custody of the prisoner the examinations and proofs relating to the offense charged to be returned by the officer with the writ.

(c) If no examination has been filed with the commitment or in the office of the clerk and none is produced by the committing judge or magistrate upon the exhibition of the writ of habeas corpus to him or her, as provided in subsection (b) of this section, the judge or magistrate shall appear in person at the time and place to which the writ is returnable and, if he or she fails to do so, may be proceeded against by attachment.

History. Rev. Stat. ch. 73, art. 2, §§ 15-17; C. & M. Dig., §§ 5104-5106; Pope's Dig., §§ 6367-6369; A.S.A. 1947, §§ 34-1720 — 34-1722; Acts 2005, No. 1994, § 282.

Amendments. The 2005 amendment inserted "or her" throughout this section; inserted "judge or" preceding "magistrate" in (b) and twice in (c); inserted "judge" preceding "magistrate or clerk" in (b); and inserted "or she" in (c).

Cross References. Attachment, § 16-110-101 et seq.

CASE NOTES

Habeas Corpus.

Where defendant on bail gave notice that his defense would be mental disease or defect, and was then incarcerated by the trial court, pending his mental health evaluation, the trial court was required to enter findings of fact and the reasons for the petitioner's incarceration pending the mental health evaluation. Rook v. Sheriff, Pulaski County, 323 Ark. 443, 914 S.W.2d 316 (1996).

16-112-110. Failure to produce petitioner.

If any person on whom a writ of habeas corpus is served fails to bring the body of the petitioner, with a return of the cause of his or her detention, at the time and place specified in the writ, he or she shall forfeit and pay the prisoner one thousand dollars ($1,000).

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5107; Pope's Dig., § 6370; A.S.A. 1947, § 34-1723.

16-112-111. Order to produce petitioner.

When the person who applies for a writ of habeas corpus shall not be in the custody of a jailor or other officer, the judge may, for good cause shown, direct the officer or person serving the writ to take the applicant into his or her custody and produce him or her on the return of the writ.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5094; Pope's Dig., § 6357; A.S.A. 1947, § 34-1723.

16-112-112. Failure to produce person because of sickness or infirmity.

(a) Whenever, from sickness or other infirmity of the person directed to be produced by a writ of habeas corpus, the person cannot, without danger, be brought before the court or judge before whom the writ is returnable, the person in whose custody he or she is may state the fact in his or her return, verifying the fact by his or her oath. The court or judge, if satisfied of the truth of the allegations, if the return is otherwise sufficient, shall proceed thereon to dispose of the matter in the same manner, as if the prisoner were brought before him, except as provided in subsection (b) of this section.

(b) If, in the case mentioned in subsection (a) of this section, it appears that the prisoner is legally imprisoned or restrained and not bailable, the judge shall proceed no further therein. If the prisoner ought to be held to answer for a bailable offense, an order shall be made accordingly. When it appears the prisoner is entitled to his or her discharge, the judge shall make an order to that effect.

History. Rev. Stat., ch. 73, art. 3, §§ 22, 23; C. & M. Dig., §§ 5113, 5114; Pope's Dig., §§ 6376, 6377; A.S.A. 1947, §§ 34-1724, 34-1725.

16-112-113. Denial, allegations, and amendment of return.

(a) The party brought before any court or judge, by virtue of any writ of habeas corpus, may deny the material facts set forth in the return, or allege any fact to show either that his or her detention or imprisonment is unlawful, or that he or she is entitled to his or her discharge. The allegations or denials shall be on oath.

(b) The return and the allegations made against it may be amended, by leave of the court or judge before whom the writ is returned at any time, that thereby material facts may be ascertained.

History. Rev. Stat., ch. 73, art. 3, §§ 2, 3; C. & M. Dig., §§ 5109, 5110; Pope's Dig., §§ 6372, 6373; A.S.A. 1947, §§ 34-1726, 34-1727.

CASE NOTES

Constitutional Rights.

Petitioner's contention that, by refusing him habeas corpus, the state failed to provide him a clearly defined post conviction remedy by which claims of infringement of federal rights could be asserted was rejected where he could have asserted any alleged deprivation of his constitutional rights on appeal in the first instance. Mitchell v. State, 233 Ark. 578, 346 S.W.2d 201 (1961).

16-112-114. Witnesses.

(a) The officer issuing the writ in vacation or the officer before whom it may be returned for trial shall have the same power to compel the

attendance of witnesses or to punish a contempt of his authority, as a court of record has. His or her judgment on the trial of the writ shall be considered and be enforced as if it were a judgment of the court.

(b) At the discretion of the judge before whom the writ is returned, the affidavits of witnesses taken by either party, on reasonable notice to his or her agent or attorney, may be read as evidence on the trial of the return. However, no county or circuit judge shall hear or permit any evidence on the hearing or examination before him or her, other than the return to the writ, if the process or commitment shall appear regular on its face.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., §§ 5111, 5112; Pope's Dig., §§ 6374, 6375; A.S.A. 1947, §§ 34-1728, 34-1729.

CASE NOTES

Attendance.

Habeas corpus may issue to produce a witness confined in jail. Gibony v. Rogers, 32 Ark. 462 (1877).

16-112-115. Discharge, remand, admission to bail, or other order — Costs.

The judge before whom the writ is returned, after hearing the matter, both upon the return and any other evidence, shall either discharge or remand the petitioner, admit the prisoner to bail, or make such order as may be proper. He or she shall adjudge the costs of the proceeding, including the charge for transporting the prisoner, to be paid as shall seem right. The payment may be enforced by attachment or otherwise by the court to which the proceedings are returned.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5115; Pope's Dig., § 6378; A.S.A. 1947, § 34-1730.

CASE NOTES

Analysis

Determination.
Effect of writ.

Determination.

The writ of habeas corpus should be determined as soon as possible. Wright v. Johnson, 5 Ark. 687 (1844).

If the prisoner is held by process, the judge or court can, on writ of habeas corpus, only inquire into the validity of the process of its face. If it is issued by a court having jurisdiction of the crime charged, and is regular on its face, the prisoner will be remanded to custody; but if the sentence is a nullity or the court without jurisdiction to commit for the matter charged, or it does not charge a crime for which he could be held in custody, then he should be released. Ex parte Jackson, 45 Ark. 158 (1885); Ex parte Brandon, 49 Ark. 143, 4 S.W. 452 (1886); Ex parte Barnett, 51 Ark. 215, 10 S.W. 492 (1888); State ex rel. Burrow v. Cross, 55 Ark. 275, 18 S.W. 170 (1892); Ex parte Perdue, 58 Ark. 285, 24 S.W. 423 (1893); Ex parte Adams, 60 Ark. 93, 28 S.W. 1086 (1894); Ex parte Foote, 70 Ark. 12, 65 S.W. 706 (1901).

Where a petitioner for a writ of habeas corpus is in custody under process regular on its face, nothing will be inquired into except the jurisdiction of the court whence the process came. Rowland v. Rogers, 199 Ark. 1041, 137 S.W.2d 246 (1940).

Effect of Writ.

Where the judgment of conviction and order of commitment were void, but where the petitioner remained charged with capital murder, the granting of a writ of habeas corpus did not mean that the petitioner had to be set free; the prisoner was released from the Arkansas Department of Correction and placed in the custody of the county sheriff to be held on the charge of capital murder. Waddle v. Sargent, 313 Ark. 539, 855 S.W.2d 919 (1993).

16-112-116. Remand generally.

It shall be the duty of the court or judge forthwith to remand the prisoner if it shall appear that he is held in custody, either:

(1) By virtue of any process issued by any court or judge of the United States in a cause where the court or judge has exclusive jurisdiction;

(2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction;

(3) For any contempt especially and plainly charged in the commitment by some court, judge, or body politic having authority by law to commit for contempt so charged; and,

(4) Where the time during which the party may be legally detained has not expired.

History. Rev. Stat., ch. 73, art. 3, § 6; C. & M. Dig., § 5076; Pope's Dig., § 6339; A.S.A. 1947, § 34-1731.

CASE NOTES

Federal Jurisdiction.

The federal judges have exclusive jurisdiction of habeas corpus whenever the applicant is illegally restrained of his liberty under, or by color of, the authority of the United States, whether by virtue of a formal commitment or otherwise. Ableman v. Booth, 62 U.S. (21 How.) 506, 16 L. Ed. 169 (1858).

If the state judge or court is advised by the petition for the writ that the applicant is confined under the authority, or claim and color of authority of the United States by an officer of that government, the writ shall be refused. Where that fact does not appear in the application for the writ, but is made to appear in the return thereto, the state judge or court, being thus judicially apprised that the party is in custody under the authority of the United States, can proceed no further. Tarble's Case, 80 U.S. (13 Wall.) 397, 20 L. Ed. 597 (1871).

When a person who is an officer of the United States is charged in a state court with an offense alleged to have been committed by him in the discharge of his official duties, the judgment of a federal court or judge, having jurisdiction, discharging such officer on habeas corpus cannot be attacked for informality of procedure in a suit by the state to forfeit the bail of such officer. State v. Adler, 67 Ark. 469, 55 S.W. 851 (1900).

16-112-117. Admission to bail or remand.

Upon the trial of a habeas corpus, if the judge shall be of the opinion that the prisoner has been guilty of a misdemeanor or felony, for which the prisoner may be liable to be tried and that the proceedings against him or her are so defective that he or she cannot be detained by them, the judge shall admit him or her to bail, if he or she is entitled to bail, to appear at the court having jurisdiction over the case, or remand him

or her to the custody of the proper officer, to be conveyed to the proper county for new proceedings to be had against the prisoner.

History. Crim. Code, § 388; Acts 1871, § 5081; Pope's Dig., § 6344; A.S.A. 1947, No. 49, § 1 [388], p. 255; C. & M. Dig., § 34-1737.

16-112-118. Discharge.

(a) No person shall be discharged under the provisions of this act:

(1) Who is in custody or held by virtue of any legal engagement or enlistment in the Army or Navy of the United States;

(2) Or who, being subject to the rules and articles of war, is confined by anyone legally acting under the authority thereof;

(3) Or who is held as a prisoner of war under the authority of the United States;

(4) Or who is in custody for any treason, felony, or other high misdemeanor committed in any other state or territory and who, by the Constitution and laws of the United States, ought to be delivered up to the legal authorities of the state or territory.

(b)(1) If it appears that the prisoner is in custody by virtue of process from any court legally constituted or issued by any officer in the exercise of judicial proceedings before him, the prisoner can only be discharged in one (1) of the following cases:

(A) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum, or person;

(B) Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the party has become entitled to his or her discharge;

(C) Where the process is defective in some matter or substance required by law, rendering the process void;

(D) Where the process, though in proper form, has been issued in a case, or under circumstances, not authorized by law;

(E) Where the process, though in proper form, has been issued or executed by a person who is not authorized to issue or execute the process, or where the person having the custody of the prisoner, under the process, is not the person empowered by law to detain him or her;

(F) Where the process is not authorized by any judgment, order, decree, or by any provision of law.

(2) No court under this act shall in any other matter have power to inquire into the legality or justice of the process, judgment, decree, or order of any court, legally constituted, nor into the justice or propriety of any commitment for contempt made by any court, officer, or body corporate, according to law, and plainly charged in the commitment, as provided in this act.

(c) No person imprisoned on an indictment, found in any court of competent jurisdiction, or by virtue of any process or commitment to enforce an indictment, can be discharged under the provisions of this act. However, if the offense is bailable, he may be let to bail, and if the offense is not bailable, he or she shall be remanded forthwith.

(d) Where the imprisonment is for any criminal or supposed criminal matter, the court or judge before whom the prisoner shall be brought, under the provisions of this act, shall not discharge him or her for informality, insufficiency, or irregularity of the commitment. However, if from the examination taken and certified by the committing magistrate, or other evidence, it appears that there is sufficient legal cause for commitment, he or she shall proceed to take bail, if the offense is bailable and sufficient bail is offered, and if not, he or she shall recommit the prisoner to jail.

History. Rev. Stat., ch. 73, art. 3, §§ 7, 9, 10, 12, 13; C. & M. Dig., §§ 5077-5081; Pope's Dig., §§ 6340-6344; A.S.A. 1947, §§ 34-1732 — 34-1736.

Meaning of "this act". Rev. Stat., ch. 73 codified as §§ 16-112-103, 16-112-105 — 16-112-109, 16-112-112, 16-112-113, 16-112-116, 16-112-118, 16-112-121 — 16-112-123.

Cross References. Persons privileged from arrest, discharge on habeas corpus, § 16-81-102.

CASE NOTES

Analysis

In general.
Juvenile offenders.
Writ granted.
Writ not granted.

In General.

Generally, the writ of habeas corpus will not be issued if the petitioner is in custody pursuant to a valid order or under process regular on its face and the court making the commitment did not lack jurisdiction. Robinson ex rel. Robinson v. Shock, 282 Ark. 262, 667 S.W.2d 956 (1984).

When the petitioner is in custody pursuant to a process which appears regular and valid on its face, the circuit court has jurisdiction to try the petitioner on the charge pending against him and petitioner is not entitled to habeas corpus relief. Wade v. Tomlinson, 284 Ark. 432, 682 S.W.2d 751 (1985).

Juvenile Offenders.

What may constitute a valid order for an adult prisoner will not be facially valid where a juvenile offender in custody is involved; the constitutional right to counsel has been extended to juveniles, and where that right has been denied to the juvenile within the juvenile commitment process, then an order emanating from such a proceeding which does not reflect the fact that the juvenile was represented by legal counsel will not constitute a facially valid order and habeas corpus is an appropriate remedy. Robinson ex rel. Robinson v. Shock, 282 Ark. 262, 667 S.W.2d 956 (1984).

Writ Granted.

A person in the penitentiary was granted a writ of habeas corpus where he had been convicted by the officers of a court sitting at a time not fixed for holding court. Ex parte Jones, 27 Ark. 349 (1871).

A writ of habeas corpus may be issued to a person in a city prison convicted of a violation of a city ordinance. Ex parte Martin, 27 Ark. 467 (1872).

A convict who has been in custody of a contractor for a sufficient time to extinguish his fine and costs will be discharged. Duncan v. West, 167 Ark. 14, 267 S.W. 567 (1924).

Person committed to state hospital by county and probate judge without notice, hearing, or examination was entitled to release on habeas corpus in that the warrant or order delivered to the sheriff was not authorized by law. Rowland v. Rogers, 199 Ark. 1041, 137 S.W.2d 246 (1940).

Writ Not Granted.

Prisoner was not entitled to release because the commitment for misdemeanor failed to direct that he be imprisoned until the fine and costs were paid. Bomer v. Jones, 100 Ark. 226, 140 S.W. 22 (1911).

Cited: Von Luce v. Rankin, 267 Ark. 34, 588 S.W.2d 445 (1979); Stover v. Hamilton, 270 Ark. 310, 604 S.W.2d 934 (1980); Bruce ex rel. Bruce v. Dillahunty, 293 Ark. 479, 739 S.W.2d 522 (1987).

16-112-119. Return of proceedings.

The proceedings upon a writ of habeas corpus shall be returned to the clerk of the circuit court of the county in which the writ was heard or the court in which the prosecution, if any, is pending.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5119; Pope's Dig., § 6382; A.S.A. 1947, § 34-1738.

CASE NOTES

Cited: Ex parte Hunt, 100 Ark. 419, 140 S.W. 710 (1911).

16-112-120. Subsequent imprisonment or commitment prohibited — Exceptions.

A person released upon a writ of habeas corpus shall not again be imprisoned or committed for the same offense, except by the legal order or process of the court wherein he or she shall be bound by recognizance to appear or some other court having jurisdiction of the same cause.

History. Crim. Code, § 388; Acts 1871, No. 49, § 1 [388], p. 255; C. & M. Dig., § 5117; Pope's Dig., § 6380; A.S.A. 1947, § 34-1739.

16-112-121. Second writ.

(a) If a prisoner remanded under the provisions of this act shall obtain a second writ of habeas corpus, it shall be the duty of the officer or other person on whom the writ shall be served to return therewith the order, remanding the prisoner. If it appears that the prisoner was remanded for an offense adjudged not bailable, the prisoner shall forthwith be remanded without further proceedings.

(b) It shall not be lawful for any court or judge, on a second writ of habeas corpus, to discharge the prisoner, if he or she is clearly and specifically charged in the order remanding him or her or in the warrant of commitment, with a criminal offense. However, the prisoner, on the return of the writ, shall be bailed or remanded to prison, according to the circumstances of the case.

History. Rev. Stat., ch. 73, art. 4, §§ 7, 8; C. & M. Dig., §§ 5082, 5083; Pope's Dig., §§ 6345, 6346; A.S.A. 1947, §§ 34-1740, 34-1741.

Meaning of "this act". See note to § 16-112-118.

CASE NOTES

Offenses Not Bailable.

Where it appears from an officer's return to a writ of habeas corpus that, upon a prior application for bail, the prisoner had been remanded for an offense adjudged not bailable, such judgment is a bar to further application for bail. State ex rel. Att'y Gen. v. Williams, 97 Ark. 243, 133 S.W. 1017 (1911).

16-112-122. Issuance of writ by judge without application.

Whenever any court of record, any justice of the Supreme Court, or any judge of the circuit court or judge of the county court, shall have evidence, from any judicial proceedings had before them, that any person is illegally confined or restrained of his or her liberty within the jurisdiction of the court or judge, it shall be the duty of the court or judge to issue a writ of habeas corpus for his or her relief, although no application or petition is presented for writ.

History. Rev. Stat., ch. 73, art. 1, § 7; C. & M. Dig., § 5090; Pope's Dig., § 6353; A.S.A. 1947, § 34-1742.

CASE NOTES

Cited: Ex parte Dame, 162 Ark. 382, 259 S.W. 754 (1923); State v. Pulaski County Circuit Court, 326 Ark. 886, 934 S.W.2d 915 (1996).

16-112-123. Writ in nature of summary habeas corpus.

(a)(1) When it shall appear by satisfactory proof that any person is illegally imprisoned or restrained of his or her liberty and that there is good reason to believe that he or she will be carried out of the state, or suffer some irreparable injury before he or she can be relieved by a writ of habeas corpus, any court or judge authorized to issue the writ may issue a warrant reciting the facts and directed to any sheriff, coroner, constable, or other person, commanding him or her to take the prisoner and to bring the prisoner forthwith before the court or judge, to be dealt with according to law.

(2) Where the proof shall also be sufficient to justify the arrest of the person having the prisoner in his or her custody, as for a criminal offense committed in the taking and detaining the prisoner, the warrant shall also contain an order for the arrest of the offender.

(b) The warrant shall be executed according to the command thereof, and, when the prisoner is brought before the court or judge, the person detaining the prisoner shall make a return in like manner, and the like proceedings shall be had as if a writ of habeas corpus had been issued in the first instance.

(c) If the person having the prisoner in custody is brought before a court or a judge as for a criminal offense, he or she shall be examined, committed, bailed, or discharged in the same manner as in other criminal cases of like nature.

History. Rev. Stat., ch. 73, art. 4, §§ 1-4; C. & M. Dig., §§ 5121-5124; Pope's Dig., §§ 6384-6387; A.S.A. 1947, §§ 34-1743 — 34-1746.

Subchapter 2 — Other Relief — New Scientific Evidence

SECTION.
16-112-201. Writ of Habeas Corpus — New scientific evidence.
16-112-202. Form of motion.
16-112-203. Contents of motion.
16-112-204. Other pleadings.
16-112-205. Hearing.
16-112-206. Appeals.
16-112-207. Appointment of counsel — Latent fingerprinting services.
16-112-208. Testing procedures.

A.C.R.C. Notes. Acts 2001, No. 1780, § 1, proposed: "The General Assembly finds that the mission of the criminal justice system is to punish the guilty and to exonerate the innocent. The General Assembly further finds that Arkansas laws and procedures should be changed in order to accommodate the advent of new technologies enhancing the ability to analyze scientific evidence."

16-112-201. Writ of Habeas Corpus — New scientific evidence.

(a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate, if the person claims under penalty of perjury that:

(1) Scientific evidence not available at trial establishes the petitioner's actual innocence; or

(2) The scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.

(b) Nothing contained in this subchapter shall prevent the Arkansas Supreme Court or the Arkansas Court of Appeals, upon application by a party, from granting a stay of an appeal to allow an application to the trial court for an evidentiary hearing under this subchapter.

History. Acts 2001, No. 1780, § 4; 2005, No. 2250, § 2.

Amendments. The 2005 amendment inserted "under penalty of perjury" in (a).

Cross References. Physical evidence in sex offense prosecutions—Retention and disposition, § 12-12-104.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Criminal Law, 24 UALR L.J. 429.

Annual Survey of Caselaw, Criminal Law, 25 UALR L.J. 924.

CASE NOTES

Analysis

Applicability.
Guilty pleas.
Scientific evidence.

Applicability.

Sections 16-112-201 — 16-112-207 do not provide a remedy to persons desirous of attacking a plea on the grounds that a defendant had a history of mental illness, that the plea was coerced, or obtained by false promises, threats, misinformation, deception, or misconduct. Graham v. State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 410 (June 24, 2004).

Just as Acts 2001, No. 1780 (the Act), §§ 16-112-201 — 16-112-207, does not provide a substitute for proceeding under Ark. R. Crim. P. 37.1, the Act does not provide a substitute for a petition for writ of error coram nobis filed in the trial court. Graham v. State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 410 (June 24, 2004).

Guilty Pleas.

Denial of the prisoner's petition for writ of habeas corpus pursuant to Acts 2001, No. 1780 (the Act), §§ 16-112-201 — 16-112-207, was affirmed where (1) the prisoner claimed in the petition that the guilty plea was coerced and obtained by false promises, threats, misinformation, deception, and misconduct, (2) any challenge to the guilty plea was properly raised under Ark. R. Crim. P. 37.1, (3) the remedy provided in an error coram nobis proceeding in the trial court was also available to the prisoner to raise allegations concerning the prisoner's history of mental illness and the claim that the plea was coerced, (4) in short, there were remedies in place for the prisoner to attack the plea of guilty, and (5) if the prisoner did not avail himself of them, the prisoner could not have expanded the narrow purview of the Act to encompass any and all claims concerning the validity of the guilty plea. Graham v. State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 410 (June 24, 2004).

Scientific Evidence.

Trial court had jurisdiction to consider defendant's petition for scientific testing even where proceedings might be pending before the state Supreme Court or a state appellate court, thus, the state Supreme Court was authorized to issue a stay of proceedings before it in order to allow the trial court to consider defendant's petition for scientific testing, including whether to hold an evidentiary hearing on the matter. Echols v. State, 350 Ark. 42, 84 S.W.3d 424 (2002).

16-112-202. Form of motion.

Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid (DNA) testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if:

(1) The specific evidence to be tested was secured as a result of the conviction of an offense's being challenged under § 16-112-201;

(2) The specific evidence to be tested was not previously subjected to testing and the person making the motion under this section did not:

(A) Knowingly and voluntarily waive the right to request testing of the evidence in a court proceeding commenced on or after August 12, 2005; or

(B) Knowingly fail to request testing of the evidence in a prior motion for post-conviction testing;

(3) The specific evidence was previously subjected to testing and the person making a motion under this section requests testing that uses a new method or technology that is substantially more probative than the prior testing;

(4) The specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed testing;

(5) The proposed testing is reasonable in scope, utilizes scientifically sound methods, and is consistent with accepted forensic practices;

(6) The person making a motion under this section identifies a theory of defense that:

(A) Is not inconsistent with an affirmative defense presented at the trial of the offense being challenged under § 16-112-201; and

(B) Would establish the actual innocence of the person in relation to the offense being challenged under § 16-112-201;

(7) The identity of the perpetrator was at issue during the investigation or prosecution of the offense being challenged under § 16-112-201;

(8) The proposed testing of the specific evidence may produce new material evidence that would:

(A) Support the theory of defense described in subdivision (6) of this section; and

(B) Raise a reasonable probability that the person making a motion under this section did not commit the offense;

(9) The person making a motion under this section certifies that he or she will provide a deoxyribonucleic acid (DNA) or other sample or a fingerprint for comparison; and

(10) The motion is made in a timely fashion subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing:

(i) That the motion for a test under this section is based solely upon information used in a previously denied motion; or

(ii) Of clear and convincing evidence that the motion filed under this section was filed solely to cause delay or harassment; and

(B) There shall be a rebuttable presumption against timeliness for any motion not made within thirty-six (36) months of the date of conviction. The presumption may be rebutted upon a showing:

(i) That the person making a motion under this section was or is incompetent and the incompetence substantially contributed to the delay in the motion for a test;

(ii) That the evidence to be tested is newly discovered evidence;

(iii) That the motion is not based solely upon the person's own assertion of innocence and a denial of the motion would result in a manifest injustice;

(iv) That a new method of technology that is substantially more probative than prior testing is available; or

(v) Of good cause.

History. Acts 2001, No. 1780, § 5; 2005, No. 2250, § 3.

Amendments. The 2005 amendment rewrote this section.

CASE NOTES

Analysis

Postconviction dna testing.
Prima facie case.
Scientific testing.

Postconviction DNA Testing.

Postconviction DNA testing was properly denied as to some evidence for an African American inmate who was convicted of capital murder where: (1) caucasian hairs had not been tested at trial even though testing was available and, because it was stipulated that the inmate was not the donor, they were not materially relevant; and (2) a cigarette butt had already been retested with the result of decreasing the probability that the saliva was from a different donor; however, postconviction DNA testing of other evidence was improperly denied and the case was remanded to the trial court to have such tests conducted. Johnson v. State, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied, — U.S. —, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004).

Prima Facie Case.

Writ of habeas corpus could issue based upon new scientific evidence proving a person was actually innocent of the offense for which he was convicted; however, defendant's identity was not an issue at trial, such that he failed to state a prima facie case of actual innocence or to produce any evidence to bring his petition within the purview of § 16-112-201 et seq. Orndorff v. State, 355 Ark. 261, 132 S.W.3d 722 (2003).

Scientific Testing.

There was no basis to find that the trial court erred when it denied the prisoner's petition for scientific testing of a hair recovered at the crime scene where (1) in entering the plea of guilty, the prisoner admitted that he committed the offense, (2) thus, the prisoner's identity was not in question, and (3) there was a remedy in place for challenging a plea of guilty on the grounds advanced by the prisoner. Graham v. State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 410 (June 24, 2004).

16-112-203. Contents of motion.

(a) The petition filed under this subchapter shall be entitled in the name of the petitioner versus the State of Arkansas and shall contain:

(1)(A) A statement of the facts and the grounds upon which the petition is based and relief desired.

(B) All grounds for relief shall be stated in the petition or any amendment to the petition, unless the grounds could not reasonably have been set forth in the petition.

(C) The petition may contain argument or citation of authorities;

(2) An identification of the proceedings in which the petitioner was convicted, including the date of the entry of conviction and sentence or other disposition complained of;

(3) An identification of any previous proceeding, together with the grounds asserted in the previous proceeding, which sought to secure relief for the petitioner from the conviction and sentence or other disposition; and

(4)(A) The name and address of any attorney representing the petitioner; or

(B) If the petitioner is without counsel, the circuit clerk shall immediately transmit a copy of the petition to the judge and shall advise the petitioner of that referral.

(b) The filing of the petition and any related documents and any proceedings pursuant to the petition shall be without any costs or fees charged to the petitioner.

(c) The petition shall be:

(1)(A) Verified by the petitioner; or

(B) Signed by the petitioner's attorney; and

(2) Addressed to the court in which the conviction was entered.

(d) The circuit clerk shall deliver a copy of the petition to the prosecuting attorney and to the Attorney General.

History. Acts 2001, No. 1780, § 6.

16-112-204. Other pleadings.

(a) Within twenty (20) days after the filing of the petition, the prosecuting attorney or the Attorney General shall respond to the petition by answer or motion which shall be filed with the court and served on the petitioner if unrepresented or served on the petitioner's attorney.

(b)(1) No further pleadings are necessary except as the court may order.

(2) However, the court may at any time prior to its decision on the merits permit:

(A) A withdrawal of the petition;

(B) Amendments to the petition; and

(C) Amendments to the answer.

(3) The court shall examine the substance of the pleading and shall waive any irregularities or defects in form.

History. Acts 2001, No. 1780, § 7.

16-112-205. Hearing.

(a) Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition and response, promptly determine the issues, make findings of fact and conclusions of law, and either deny the petition or enter an order granting the appropriate relief.

(b) Hearings on a petition filed pursuant to this subchapter shall be open and shall be held in the court in which the conviction was entered.

(c)(1) The court may order the petitioner to be present at the hearing.

(2) If the petitioner is represented by an attorney, the attorney shall be present at any hearing.

(3) A verbatim record of any hearing shall be made and kept.

(4) Unless otherwise ordered by the court, the petitioner shall bear the burden of proving the facts alleged in the petition by a preponderance of the evidence.

(5) The court may receive evidence in the form of affidavit, deposition, or oral testimony.

(d) The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition if the issues raised in it have previously been decided by the Arkansas Court of Appeals or the Arkansas Supreme Court in the same case.

History. Acts 2001, No. 1780, § 8.

CASE NOTES

Cited: Graham v. State, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 410 (June 24, 2004).

16-112-206. Appeals.

(a) The appealing party, within thirty (30) calendar days after the entry of the order, shall file a notice of appeal if the party wishes to appeal.

(b)(1) If the appeal is by the petitioner, the service shall be on the prosecuting attorney and the Attorney General.

(2) If the appeal is by the state, the service shall be on the petitioner or the petitioner's attorney.

(c) No fees or bond for costs shall be required for the appeal.

History. Acts 2001, No. 1780, § 9.

16-112-207. Appointment of counsel — Latent fingerprinting services.

(a)(1) A person financially unable to obtain counsel who desires to pursue the remedy provided in this subchapter may apply for representation by the Arkansas Public Defender Commission or appointed private attorneys.

(2) The trial public defenders or appointed private attorneys may represent indigent persons who apply for representation under this section.

(b)(1)(A) With the approval of the court, petitioners may use the services of the State Crime Laboratory for latent fingerprinting identification, deoxyribonucleic acid (DNA) testing, and other tests which may become available through advances in technology.

(B)(i) If approved by the court, the State Crime Laboratory shall provide the requested services.

(ii) Samples shall be of sufficient quantity to allow testing by both the prosecution and the defense.

(iii) Neither the prosecution nor the defense shall consume the entire sample in testing in the absence of a court order allowing the sample to be entirely consumed in testing.

(2) Subdivision (b)(1) of this section shall not apply to any tests before trial of a matter that will be governed by relevant constitutional provisions, statutory law, or court rules.

(c) The Executive Director and the State Crime Laboratory shall give priority to claims based on factors including:

(1) The opportunity for conclusive or near conclusive proof through scientific evidence that the person is actually innocent; and

(2) A lengthy sentence of imprisonment or a death sentence.

History. Acts 2001, No. 1780, § 10.

16-112-208. Testing procedures.

(a)(1) A court that orders any deoxyribonucleic acid (DNA) testing under this subchapter shall direct the testing to be carried out by the State Crime Laboratory.

(2)(A) However, the court may order deoxyribonucleic acid (DNA) testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

(B) As used in this section, "qualified laboratory" means a laboratory that is accredited by the American Society of Crime Laboratory Directors or certified through the National Forensic Science Technology Center.

(3) The court may order the person who requested any deoxyribonucleic acid (DNA) testing under this subchapter to pay for the cost of the testing if the court determines that the person has the ability to pay for the testing.

(b) If the deoxyribonucleic acid (DNA) test results obtained under this subchapter are inconclusive, the court may order additional testing or deny further relief to the person who requested the testing.

(c)(1) If deoxyribonucleic acid (DNA) test results obtained under this subchapter establish that the person who requested the testing was the source of the deoxyribonucleic acid (DNA) evidence, the court shall deny any relief to the person.

(2) On motion of the state, the court shall determine if the person's assertion of actual innocence was false. If the court finds that the person's assertion of actual innocence was false, the court may:

(A) Hold the person in contempt;

(B) Assess against the person the cost of any deoxyribonucleic acid (DNA) testing carried out under this subchapter;

(C) Forward the finding to the Board of Corrections for consideration in the awarding of meritorious good time to the person; or

(D) Forward the finding to the Parole Board for consideration in the granting of parole to the person.

(d) In any prosecution of a person for perjury or other conduct resulting from a proceeding under this subchapter, upon conviction or a plea of guilty or nolo contendere the court shall sentence the person to a term of imprisonment that shall run consecutively to any other term of imprisonment the person is serving.

(e)(1) If deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude a person as the source of the deoxyribonucleic acid

(DNA) evidence, the person may file a motion for a new trial or resentencing.

(2) The court shall establish a reasonable schedule for the person to file a motion under subdivision (e)(1) of this section and for the state to respond to the motion.

(3) The court may grant the motion of the person for a new trial or resentencing if the deoxyribonucleic acid (DNA) test results, when considered with all other evidence in the case regardless of whether the evidence was introduced at trial, establish by compelling evidence that a new trial would result in an acquittal.

(f) In a case in which a person is sentenced to death, any deoxyribonucleic acid (DNA) testing ordered under this subchapter shall be completed:

(1) No later than sixty (60) days after the date on which the state responds to the motion described in §§ 16-112-202 and 16-112-203; or

(2) No later than one hundred twenty (120) days after the date on which the deoxyribonucleic acid (DNA) testing was ordered under any post-conviction testing procedures under this subchapter.

(g)(1) The results of any deoxyribonucleic acid (DNA) testing ordered under this subchapter shall be simultaneously disclosed to the court, the person that requested the testing, and the State of Arkansas.

(2)(A) The state shall submit any test results relating to a person's deoxyribonucleic acid (DNA) to the National DNA Index System.

(B) If the deoxyribonucleic acid test (DNA) results obtained under this subchapter are inconclusive or show that the person tested was the source of the deoxyribonucleic acid (DNA) evidence, the deoxyribonucleic acid (DNA) sample of the person tested may be retained in the National DNA Index System and State DNA Data Base.

(C) If the deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude the person tested as the source of the deoxyribonucleic acid (DNA) evidence but a comparison of the deoxyribonucleic acid (DNA) sample of the person tested results in a match between the person's sample and another offense, the State Crime Laboratory shall notify the appropriate agency and preserve the deoxyribonucleic acid (DNA) sample of the person tested.

(D) The State Crime Laboratory shall destroy the deoxyribonucleic acid (DNA) sample of the person tested and ensure that the information is not retained in the National DNA Index System or the State DNA Data Base if:

(i) The deoxyribonucleic acid (DNA) test results obtained under this subchapter exclude the person tested as the source of the deoxyribonucleic acid (DNA) evidence;

(ii) A comparison of the deoxyribonucleic acid (DNA) sample through a search of the data base or system does not match the person's sample and another offense; and

(iii) There is no other legal authority to retain the sample of the person tested in data base or system.

History. Acts 2005, No. 2250, § 4.

CHAPTER 113
INJUNCTIONS

SUBCHAPTER.
1. General Provisions.
2. Proceedings.
3. Grant.
4. Modification or Dissolution.

Publisher's Notes. Some provisions of this chapter may be superseded by ARCP 65.

RESEARCH REFERENCES

ALR. Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond. 30 ALR 4th 273.

Ark. L. Rev. Minimum Standards of Judicial Administration — Arkansas, 5 Ark. L. Rev. 1.

Subchapter 1 — General Provisions

SECTION.
16-113-101. Injunction defined.
16-113-102. Final judgment or provisional remedy.
16-113-103. [Superseded.]
16-113-104. Writ abolished.

Cross References. Injunctions and temporary restraining orders, ARCP 65.

RESEARCH REFERENCES

Am. Jur. 42 Am. Jur. 2d, Inj., § 1 et seq.

C.J.S. 43A C.J.S., Inj., § 1 et seq.

16-113-101. Injunction defined.

The injunction provided by this code is a command to refrain from a particular act.

History. Civil Code, § 293; C. & M. Dig., § 5816; Pope's Dig., § 7532; A.S.A. 1947, § 32-101.

Publisher's Notes. The code referred to in this section means the Code of Practice in Civil Cases of 1869. See parallel reference tables in tables volume.

16-113-102. Final judgment or provisional remedy.

An injunction may be the final judgment in an action, or may be allowed as a provisional remedy. Where so allowed, it shall be by order.

History. Civil Code, § 293; C. & M. Dig., § 5791; Pope's Dig., § 7506; A.S.A. 1947, § 32-101.

CASE NOTES

Damages.

Chancery court had jurisdiction to enjoin city located within county to refrain from dumping raw sewage in creek to detriment of downstream landowners but would not have had jurisdiction to award damages for such action as to landowners located in another county so that consent decree enjoining each action would not preclude subsequent suit by out-of-county landowners in county where land lay alleging that pollution of stream amounted to a taking of owners' land by city and seeking damages for the taking. Weathers v. Springdale, 239 Ark. 535, 390 S.W.2d 125 (1965).

16-113-103. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning punishment for breach of injunction, was deemed superseded by the Arkansas Rules of Civil Procedure. The section was derived from Civil Code, § 311; C. & M. Dig., § 5281; Pope's Dig., § 7537; A.S.A. 1947, § 32-401.

16-113-104. Writ abolished.

The writ of injunction is abolished.

History. Civil Code, § 293; C. & M. Dig., § 5815; Pope's Dig., § 7531; A.S.A. 1947, § 32-101.

RESEARCH REFERENCES

Ark. L. Notes. Becker, The Remedial Side of Contempt When Injunctions Are Disregarded, 1983 Ark. L. Notes 5.

Subchapter 2 — Proceedings

SECTION.
16-113-201. [Superseded.]
16-113-202. Affidavits.
16-113-203. Injunction bonds.
16-113-204. Order of injunction — Issuance — Service.
16-113-205. Service of order unnecessary where notice given — Party bound upon execution of bond.
16-113-206. Party bound upon notice.
16-113-207. Not granted when motion overruled — Certificate of refusal.

RESEARCH REFERENCES

Am. Jur. 42 Am. Jur. 2d, Inj., § 231 et seq.

C.J.S. 43A C.J.S., Inj., § 203 et seq.

16-113-201. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning notice of application for an injunction, was deemed superseded by the Arkansas Rules of Civil Procedure. The section was derived from Civil Code, §§ 298-300; C. & M. Dig., §§ 5796-5798; Pope's Dig., §§ 7512-7514; A.S.A. 1947, §§ 32-201—32-203.

16-113-202. Affidavits.

(a) On the hearing of an application for an injunction of which notice has been given, each party may read affidavits.

(b) The affidavits read upon an application for an injunction shall be filed with the papers of the case.

History. Civil Code, §§ 301, 312; C. & M. Dig., §§ 5789, 5790; Pope's Dig., §§ 7504, 7505; A.S.A. 1947, §§ 32-204, 32-205.

16-113-203. Injunction bonds.

(a) In every case, the court or judge granting an injunction shall specify in the order therefor an amount, for which the party obtaining it shall give security in a bond to the party enjoined, before the injunction shall become effectual. The amount of the bond shall be sufficient to cover all the probable damages and costs that may be occasioned by the injunction.

(b) The court or judge may prescribe the effect of the bond, so as to secure to the party enjoined the damages to which he or she may become entitled if it is finally decided that the injunction ought not to have been granted.

(c)(1) Where the injunction is to stay proceedings upon a judgment or final order for money, the amount for which security is required shall be sufficient to cover, with other damages, the sum enjoined, with five (5) years' interest thereon.

(2) When the injunction is to stay proceedings upon a judgment for property, the amount specified in the order shall be sufficient to cover also the rent, hire, or value of the use thereof for two (2) years; and in case of personal property, its value likewise.

(d) The order of injunction shall not be issued by the clerk until the bond mentioned in subsections (a)-(c) of this section has been executed in his or her office by one (1) or more sufficient sureties of the party obtaining the injunction.

(e)(1) Where the injunction is to stay proceedings upon a judgment or final order, the bond shall be to the effect that the party obtaining the injunction will satisfy the judgment or order, or so much of it as is

enjoined, to the extent to which the injunction may be dissolved and that he or she will also satisfy any modified judgment or order that may be rendered or made in lieu of it, or so much of it as exceeds the amount left unenjoined.

(2) In other cases, unless otherwise directed by the court or judge, the bond shall be to the effect that the party giving it will pay to the party enjoined such damages as he may sustain if it is finally decided that the injunction ought not to have been granted.

(f)(1) In case of injunction to stay proceedings upon a judgment or final order, the officer granting the injunction may authorize a bond to be executed to the effect that the party obtaining the injunction will pay to the party enjoined such damages as he or she may sustain if it is finally decided that the injunction ought not to have been granted.

(2) However, if, at the time the injunction is granted and bond executed, any execution or attachment has been levied upon the property of the party obtaining the injunction, the levy shall not be discharged by reason of the injunction, but it shall remain in full force until the final decision as to the injunction unless the party obtaining the injunction shall give bond in the form prescribed by law.

(g) Sureties in injunction bonds shall be taken by the clerk, under the same responsibilities as in other cases of sureties taken by him or her.

(h)(1) A party enjoined may, at any time before judgment, upon reasonable notice to the party who has obtained the injunction, move the court for additional security on behalf of the party enjoined.

(2) If it appears on the notice that the surety in the injunction bond has removed from this state, or is insufficient, the court may vacate the order of injunction unless in a reasonable time sufficient security is given.

History. Civil Code, §§ 302-304, 313, 314; C. & M. Dig., §§ 5801-5808, 5819; Pope's Dig., §§ 7517-7524, 7535; A.S.A. 1947, §§ 32-206 — 32-210.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that subsections (a)-(c) of this section were deemed superseded by the Arkansas Rules of Civil Procedure.

CASE NOTES

Analysis

Damages.
Liability.
Requirement.

Damages.

Where a person was unlawfully jailed in defiance of an unlawful temporary injunction, damages therefrom could not be recovered against the temporary injunction bond because such damages were collateral to, and not the natural consequence of, the wrongful issuance of the temporary injunction. Hayes v. State, 254 Ark. 680, 496 S.W.2d 372 (1973).

Liability.

When a judgment has been enjoined and the injunction dissolved, the party on the bond is not required to pay the judgment enjoined if it does not appear that an opportunity to collect it has been lost by reason of the injunction. Neal v. Taylor, 56 Ark. 521, 20 S.W. 352 (1892). But see Ford v. Ferguson & Son, 184 Ark. 670, 43 S.W.2d 546 (1931).

There is no liability on a bond where the injunction was rightfully issued. Bowen v. Lovewell, 119 Ark. 64, 177 S.W. 929 (1915).

Requirement.

The judge may, if it appears that the rights of the parties demand it, require a bond to pay the judgment sought to be enjoined, as a condition of granting it. Neal v. Taylor, 56 Ark. 521, 20 S.W. 352 (1892).

An order for temporary injunction without requiring bond is void unless made under § 16-113-201(a). Harahan Viaduct Imp. Dist. v. Martineau, 172 Ark. 189, 288 S.W. 10 (1926).

It is only where an injunction is granted as a provisional remedy and not where it is granted as a final judgment that a bond is required to be executed by the plaintiff. Citizens Pipe Line Co. v. Twin City Pipe Line Co., 183 Ark. 1006, 39 S.W.2d 1017 (1931).

A chancery court has no jurisdiction to award a temporary injunction without first requiring a bond in an adequate amount, and with sufficient sureties, insuring that those obtaining it will pay any damages resulting from improper issuance of the temporary injunction. Brown v. Adept, Inc., 242 Ark. 1, 411 S.W.2d 868 (1967).

Cited: Brown v. Adept, Inc., 242 Ark. 1, 411 S.W.2d 868 (1967).

16-113-204. Order of injunction — Issuance — Service.

(a) The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be dated and signed by the clerk.

(b)(1) Where the order of injunction is issued at the commencement of the action, it shall be endorsed upon the summons, and the copy thereof delivered to the sheriff.

(2) Where the order of injunction is issued during the litigation, it shall be delivered to him or her with as many copies thereof as there are parties enjoined.

(c) The sheriff shall forthwith serve the order of injunction by delivering a copy to each party enjoined and make return thereof on the order.

History. Civil Code, § 305; C. & M. Dig., § 5817; Pope's Dig., § 7533; A.S.A. 1947, § 32-211.

Cross References. Issuance in absence of chancellor, § 16-13-321.

16-113-205. Service of order unnecessary where notice given — Party bound upon execution of bond.

Where notice of the application for an injunction has been given to the party enjoined, it shall not be necessary to serve the order upon him or her. He or she is bound by the injunction as soon as the bond required of the adverse party is executed.

History. Civil Code, § 306; C. & M. Dig., § 5818; Pope's Dig., § 7534; A.S.A. 1947, § 32-212.

CASE NOTES

In General.

A defendant in an injunction suit is bound to take notice of the issuance of a permanent injunction. Sullivan v. State,

191 Ark. 180, 83 S.W.2d 824 (1935).

Cited: Brown v. Adept, Inc., 242 Ark. 1, 411 S.W.2d 868 (1967).

16-113-206. Party bound upon notice.

An injunction binds the party from the time he or she is informed thereof.

History. Civil Code, § 307; C. & M. Dig., § 5820; Pope's Dig., § 7536, A.S.A. 1947, § 32-213.

CASE NOTES

Cited: Pitcock v. State, 91 Ark. 527, 121 S.W. 742 (1909).

16-113-207. Not granted when motion overruled — Certificate of refusal.

(a) No injunction shall be granted by a circuit judge after a motion therefor has been overruled by the court.

(b) A judge refusing an application for an injunction, if requested by the defendant, shall give him or her a certificate thereof.

History. Civil Code, § 310; C. & M. Dig., §§ 5799, 5800; Pope's Dig., §§ 7515, 7516; A.S.A. 1947, § 32-214; Acts 2003, No. 1185, § 233.

Amendments. The 2003 amendment, in (a), deleted "or probate" preceding "judge" in the first sentence, and deleted the second sentence.

CASE NOTES

Disqualification of Judge.

Petitioner was not prevented from securing injunction from another judge where chancellor disqualified himself, since chancellor did not pass on petition. Lykes v. Texarkana, 223 Ark. 287, 265 S.W.2d 539 (1954).

Subchapter 3 — Grant

SECTION.
16-113-301. Authority to grant — Time of grant.
16-113-302. [Superseded.]
16-113-303. [Repealed.]
16-113-304. Injunction to stay proceedings on judgment or order brought in court rendering judgment or order — Affidavit.
16-113-305. Stay of enforcement of statutes or orders of administrative boards.
16-113-306. Illegal or unauthorized taxes and assessments enjoined.
16-113-307. [Repealed.]

Cross References. Injunctions granted by circuit or county judges in absence of chancellor after commencement of action, § 16-13-321.

Power of county judge to issue injunctions in absence of circuit judge from county, Ark. Const., Art. 7, § 37.

Preambles. Acts 1935, No. 94, contained a preamble which read: "Whereas, it is provided by an act of Congress passed June 8, 1910, and subsequently amended on March 3, 1911, March 4, 1913, and February 13, 1925, that if before final hearing of an application for an injunction in a United States District Court to restrain the enforcement of a statute or order of an administrative board or commission, a suit shall be brought in a court of the State having jurisdiction thereof under the laws of such State, accompanied by a stay in such State Court of proceedings to enforce such statute or order pending the determination of such suit by such State Court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State...."

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875, No. 100, § 3: effective on passage.

Acts 1935, No. 94, § 2: approved Mar. 2, 1935. Emergency clause provided: "It is found to be a fact that undue and unnecessary delay is often caused by the filing of injunction suits in the United States District Court against the enforcement of statutes and orders of administrative boards of the State, and that such delay can be avoided by conferring jurisdiction upon the State courts to grant stays, which will result in the staying of proceedings in the United States District Court pending the determination of such suit in the courts of the State. Therefore, an emergency is hereby declared and this act shall take effect and be in full force from and after its passage."

Acts 1991, No. 266, § 17: Feb. 28, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that since the recent court decision in Bates v. Bates, this state has lacked adequate remedies for dealing with domestic violence and abuse; that the problem of domestic violence and abuse in our society is so complex that proper judicial remedies for victims and potential victims transcend the traditional jurisdictions of circuit and municipal court; that every potential remedy should be made available to members of households who have been subjected to abuse or are likely to be subjected to abuse such as to provide for the issuance of a protective order. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force upon its passage and approval."

RESEARCH REFERENCES

Am. Jur. 42 Am. Jur. 2d, Inj., § 23 et seq.

C.J.S. 43 C.J.S., Inj., § 12 et seq.

16-113-301. Authority to grant — Time of grant.

(a) The injunction may be granted at the commencement of the action or at any time before judgment by the circuit court when it appears by the complaint that the plaintiff is entitled thereto. During litigation, it may be granted by the court when it satisfactorily appears by affidavits that sufficient grounds exist therefor.

(b) In the absence of the circuit judge from the county, the county judge of any county shall have power to issue orders for injunctions and other provisional writs in his or her county, returnable to the court having jurisdiction. However, each party may have the order reviewed by the circuit judge.

History. Civil Code, § 295; Acts 1871, No. 48, § 1 [295], p. 219; 1875, No. 100, § 2, p. 219; C. & M. Dig., §§ 5794, 5795; Pope's Dig., §§ 7510, 7511; A.S.A. 1947, §§ 32-102, 32-104; Acts 2003, No. 1185, § 234.

Amendments. The 2003 amendment, in (a), substituted "circuit court" for "court, the judge thereof, or any chancellor" in the first sentence and deleted "by the judge thereof, or by any chancellor" following "court" in the second sentence; and substituted "the circuit judge" for "any superior judge in vacation, when notice of the application shall be given at least ten (10) days before the application is made" in (b).

CASE NOTES

Analysis

Jurisdiction.
Preliminary injunction.

Jurisdiction.

Where an injunction is issued as a provisional remedy only, the order must be returnable to the court having jurisdiction of the cause, which alone has power to make the injunction perpetual. Cox v. Little Rock & M.R.R., 55 Ark. 454, 18 S.W. 630 (1892).

Chancery court had jurisdiction to enjoin city located within county to refrain from dumping raw sewage in creek to detriment of downstream landowners but would not have had jurisdiction to award damages for such action as to landowners located in another county so that consent decree enjoining each action would not preclude subsequent suit by out-of-county landowners in county where land lay alleging that pollution of stream amounted to a taking of owners' land by city and seeking damages for the taking. Weathers v. Springdale, 239 Ark. 535, 390 S.W.2d 125 (1965).

A chancellor who has determined the chancery court lacks jurisdiction of a suit begun there may enjoin the parties to retain the status quo until the merits of the case are decided in a circuit court; the chancellor has the authority to do so if it appears that the remedy at law might otherwise be inadequate. American Investors Life Ins. Co. v. TCB Transp., Inc., 312 Ark. 343, 849 S.W.2d 509 (1993).

Preliminary injunction.

A common function of a temporary restraining order or a preliminary injunction is to maintain the status quo until the merits of a controversy are decided. American Investors Life Ins. Co. v. TCB Transp., Inc., 312 Ark. 343, 849 S.W.2d 509 (1993).

Cited: McClain v. McClain, 222 Ark. 729, 263 S.W.2d 911, 264 S.W.2d 595 (1953); Cummings v. Fingers, 296 Ark. 276, 753 S.W.2d 865 (1988); Bates v. Bates, 303 Ark. 89, 793 S.W.2d 788 (1990).

16-113-302. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning temporary injunctions, was deemed superseded by the Arkansas Rules of Civil Procedure. The section was derived from Civil Code, § 294; C. & M. Dig., § 5792; Pope's Dig., § 7508; A.S.A. 1947, § 32-103.

16-113-303. [Repealed.]

Publisher's Notes. This section, concerning staying proceedings on judgment of justice of the peace or probate court and jurisdictional amount, was repealed by Acts 2003, No. 1185, § 235. The section was derived from Civil Code, § 308; C. & M. Dig., § 5787; Pope's Dig., § 7502; A.S.A. 1947, § 32-107.

16-113-304. Injunction to stay proceedings on judgment or order brought in court rendering judgment or order — Affidavit.

An injunction to stay proceedings on a judgment or final order of a court shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment or order was rendered or made. Nor shall such injunction be granted by any officer unless the party applying therefor makes affidavit that no injunction has been previously granted to stay the proceedings on the judgment or order.

History. Civil Code, § 309; C. & M. Dig., § 5788; Pope's Dig., § 7503; A.S.A. 1947, § 32-108.

CASE NOTES

Analysis

Applicability.
Adequate remedy.

Applicability.

This section has no applicability to judgments rendered or orders made by a justice of the peace. Twin City Bank v. J. S. McWilliams Auto Co., 182 Ark. 1086, 34 S.W.2d 229 (1931).

Adequate Remedy.

Injunction cannot be granted against judgment where other adequate remedy is available. Arkadelphia Lumber Co. v. Asman, 79 Ark. 284, 95 S.W. 134 (1906).

Cited: Sledge-Norfleet Co. v. Matkins, 154 Ark. 509, 243 S.W. 289 (1922).

16-113-305. Stay of enforcement of statutes or orders of administrative boards.

In all cases where applications are made in any court in this state having jurisdiction thereof to enforce any statute or order of an administrative board or commission of this state, a stay against the enforcement of the statute or order may be issued by the court pending the determination of the suit by the state court.

History. Acts 1935, No. 94, § 1; Pope's Dig., § 7542; A.S.A. 1947, § 32-105.

CASE NOTES

Analysis

Federal courts.
Applicability.

Federal Courts.

The filing of an action in the state court to enforce an order of the state refunding board in which a stay was entered was held not to prevent the federal district court from proceeding with the suit to enjoin the execution of such order where the state court action was only a sham proceeding in which there was no real dispute between the parties concerned. Peltason, Tenebaum & Harris, Inc. v. Refunding Bd., 16 F. Supp. 179 (W.D. Ark. 1935).

Applicability.

In an action challenging a regulation issued by the Game and Fish Commission which prohibited commercial duck hunting guides from operating on three wild-

life management areas on Saturdays and Sundays during the duck hunting season and also prohibited waterfowl hunters from hunting while being guided by a commercial duck guide on those same areas on weekends, the plaintiffs were not entitled to a stay under this section as the plaintiffs did not make an application to enforce any statute or order. Arkansas State Game & Fish Comm'n v. Sledge, 344 Ark. 505, 42 S.W.3d 427 (2001).

16-113-306. Illegal or unauthorized taxes and assessments enjoined.

The circuit judge for any county may grant injunctions and restraining orders, in all cases of illegal or unauthorized taxes and assessments by county, city, or other local tribunals, boards, or officers. No clerk or deputy clerk shall be authorized to grant restraining orders or injunctions.

History. Civil Code, § 296; Acts 1871, No. 48, § 1 [296], p. 219; 1873, No. 88, § 1 [296], p. 213; C. & M. Dig., § 5786; Pope's Dig., § 7501, A.S.A. 1947, § 32-106.

RESEARCH REFERENCES

Ark. L. Rev. Taxpayers' Suits to Prevent Illegal Exactions in Arkansas, 8 Ark. L. Rev. 129.

CASE NOTES

Analysis

In general.
Federal jurisdiction.
Improper levy.
Jurisdiction.
Parties.

In General.

The court of equity would not restrain the collection of an illegal tax unless irreparable injury would otherwise ensue. Oliver, Sheriff & Collector v. Memphis & L.R.R., 30 Ark. 128 (1875) (decision under prior law).

Where there may have been a flaw in the assessment or collection procedures concerning the manner in which the building was assessed as a parcel separate from the lot itself, the flawed procedure does not make the assessment or the exaction illegal or unauthorized. McIntosh v. Southwestern Truck Sales, 304 Ark. 224, 800 S.W.2d 431 (1990).

Appellate jurisdiction over injunctive relief that was granted to stop the county's assessment and collection of real property tax based on a reappraisal of the real property was confined to a review of the circuit court's interlocutory order granting the injunction, not on the tax issues. Villines v. Harris, 340 Ark. 319, 11 S.W.3d 516 (2000).

Federal Jurisdiction.

In an action to enjoin the assessment and collection of taxes, and where the plaintiffs had a plain, speedy, and efficient remedy in the Arkansas courts under this section, § 14-90-501, § 14-90-804, and § 16-111-103, the Tax Injunction Act, 28 U.S.C. § 1341, barred federal jurisdiction. Burris v. City of Little Rock, 941 F.2d 717 (8th Cir. 1991).

Improper Levy.

Where the record shows a prima facie valid levy of taxes, which it would require extrinsic evidence to show the invalidity of, or where the parties affected by an illegal levy are numerous so that redress at law would require a multiplicity of suits, a court of equity will enjoin. Greedup v. Franklin County, 30 Ark. 101 (1875).

In a proceeding to form an improvement district, the board of improvement is not authorized to substitute for the improvement asked an entirely different and more expensive improvement, and the collec-

tions of all assessments to pay for the improvement will be enjoined. Watkins v. Griffith, 59 Ark. 344, 27 S.W. 234 (1894).

In the absence of a showing that the quorum court had abused its discretion in ordering the levy of a three-mill tax to retire county bonds, the tax itself not being illegal or unauthorized, the chancellor was without power to enjoin the collection upon a complaint merely that the levy was excessive. Missouri Pac. R.R. v. Fish, 181 Ark. 863, 28 S.W.2d 333 (1930).

Taxes assessed on the market value of property, instead of on one-half of its value, while excessive, were neither illegal nor unauthorized as to authorize an injunction against their collection. Beard v. Wilcockson, 184 Ark. 349, 42 S.W.2d 557 (1931).

Jurisdiction.

The chancery court has jurisdiction to restrain the collection of an illegal tax. Harrison v. Norton, 104 Ark. 16, 148 S.W. 497 (1912); McIntosh v. Southwestern Truck Sales, 304 Ark. 224, 800 S.W.2d 431 (1990).

Because injunctions are historically equitable and fall within the exclusive jurisdiction of the chancery court, the circuit court's order enjoining the county from collecting any tax based on a county-wide reappraisal was in error. Villines v. Harris, 340 Ark. 319, 11 S.W.3d 516 (2000).

Parties.

A citizen and taxpayer is entitled to an injunction against the collection of an illegal or unauthorized tax. Merwin v. Fussell, 93 Ark. 336, 124 S.W. 1021 (1910).

Any taxpayer, citizen, or corporation has the right to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax. McDaniel v. Texarkana Cooperage & Mfg. Co., 94 Ark. 235, 126 S.W. 727 (1910).

Cited: Scott County v. Frost, 305 Ark. 358, 807 S.W.2d 469 (1991).

16-113-307. [Repealed.]

Publisher's Notes. This section, concerning physical violence or threat by spouse, was repealed by Acts 1991, No. 266, § 13. The section had been previously repealed by Acts 1989, No. 636, § 8. The section was derived from Acts 1987, No. 425, § 1.

Subchapter 4 — Modification or Dissolution

SECTION.

16-113-401. Injunctions before final judgment — Control of court.
16-113-402. Motion — Notice.
16-113-403. Continuance of motion.
16-113-404. Order upon hearing.
16-113-405. Assessment of damages upon dissolution of injunction or restraining order.
16-113-406. Liability of sureties — Notice.

Effective Dates. Acts 1915, No. 102, § 3: approved Mar. 3, 1915. Emergency declared.

RESEARCH REFERENCES

Am. Jur. 42 Am. Jur. 2d, Inj., § 302 et seq.

C.J.S. 43 C.J.S., Inj., § 368 et seq.

16-113-401. Injunctions before final judgment — Control of court.

All injunctions granted before final judgment shall be subject to the further order of the court.

History. Civil Code, § 297; C. & M. Dig., § 5809; Pope's Dig., § 7525; A.S.A. 1947, § 32-301.

16-113-402. Motion — Notice.

(a) The party enjoined may, at any time, upon reasonable notice to the plaintiff, move the court, upon the plaintiff's complaint and affidavits alone, to dissolve or modify an injunction of the application for which no notice was given.

(b) After answer filed by the party enjoined, he or she may give notice to the plaintiff of a motion to be made to the court in not less than ten (10) days thereafter, upon the whole case, to dissolve or modify the injunction.

(c) Upon the motion, each party may read depositions and other competent evidence in writing for the purposes of the motion.

(d) The court shall not be bound to take the answer as true.

(e) Only one (1) motion to dissolve or modify an injunction upon the whole case shall be allowed.

History. Civil Code, §§ 314½, 316, 319; Acts 1873, No. 88, § 1 [316], p. 213; C. & M. Dig., §§ 5810, 5811, 5814; Pope's Dig., §§ 7526, 7527, 7530; A.S.A. 1947, §§ 32-302, 32-303.

CASE NOTES

Analysis

Contempt.
Jurisdiction.

Contempt.

Where a circuit judge, in the chancellor's absence, granted a temporary injunction at the plaintiff's instance which the chancellor subsequently dissolved, the circuit judge had no power to treat the defendant as in contempt for disobeying the injunction after its dissolution. Ex parte Simmons, 105 Ark. 19, 150 S.W. 141 (1912).

Jurisdiction.

Where a circuit judge, in the chancellor's absence, granted a temporary injunction at the plaintiff's instance and the chancellor subsequently dissolved the injunction without requiring the defendant to file an answer or give 10 days' notice, the order was not an excess of jurisdiction, but only an erroneous decision. Ex parte Simmons, 105 Ark. 19, 150 S.W. 141 (1912).

16-113-403. Continuance of motion.

(a) The motion upon the whole case to dissolve or modify the injunction may be postponed, on the application of either party, to a subsequent day, or to the next term, where the court is satisfied that, under the circumstances of the case, the delay is proper.

(b) When delay is asked, in order to obtain the testimony of a witness, it must appear by affidavit what facts the witness is expected to prove, that the affiant believes his or her testimony will be true, and that it could not have been obtained by due diligence.

History. Civil Code, § 317; C. & M. Dig., § 5812; Pope's Dig., § 7528; A.S.A. 1947, § 32-304.

16-113-404. Order upon hearing.

After hearing the motion, the court or judge shall overrule the motion, or dissolve or modify the injunction, according to the right of the case.

History. Civil Code, § 318; C. & M. Dig., § 5813; Pope's Dig., § 7529; A.S.A. 1947, § 32-305.

CASE NOTES

Analysis

Appeals.
Orders in vacation.

Appeals.

An appeal to the Supreme Court from an order dissolving an injunction does not revive the injunction during the pendency of the appeal. Payne v. McCabe, 37 Ark. 318 (1881).

Orders in Vacation.

The order of a chancellor at chambers dissolving an injunction issued by him in vacation is interlocutory and cannot be quashed by the Supreme Court on certiorari nor appealed from until final judgment in the circuit court. Ex parte Hawley, 24 Ark. 596 (1867); Citizens Bank of Louisiana v. Walker, 26 Ark. 468 (1871); Miller v. O'Bryan, 36 Ark. 200 (1880); Sanders v. Plunkett, 40 Ark. 507 (1883).

A circuit judge has power to dissolve in vacation an injunction ordered by himself in vacation, but the defendant cannot have any damages on the bond. Sanders v. Plunkett, 40 Ark. 507 (1883).

16-113-405. Assessment of damages upon dissolution of injunction or restraining order.

(a)(1) Upon the dissolution in whole or in part of any injunction or restraining order of any and every kind and nature whatsoever, the circuit court wherein the injunction or restraining order was pending may assess and render against principal and sureties on the injunction bond a valid judgment for any and all damages occasioned by the issuance of such injunction or restraining order.

(2) The court may either appoint a master to report as to the damages, or may render summary judgment therefor, or at its discretion may cause a jury to be empaneled to find the damages.

(b) Where money is enjoined, the damages may be any rate percent on the amount released by the dissolution which in the discretion of the court may be proper, not exceeding ten percent (10%).

(c) Where the delivery of property has been delayed by the injunction, the value of the use, hire, or rent thereof shall be assessed.

History. Civil Code, § 320; Acts 1915, No. 102, § 1; C. & M. Dig., §§ 5822-5824; Pope's Dig., §§ 7538-7540; A.S.A. 1947, §§ 32-307 — 32-309.

CASE NOTES

Analysis

Appeals.
Damages.
Judgments.

Appeals.

On appeal from chancery court decree awarding damages upon dissolution of injunction previously granted, the question of excessive damages is a question of fact to be tried de novo by the Supreme Court. Evans v. Weise, 234 Ark. 137, 350 S.W.2d 616 (1961).

In appeal from chancery court's judgment dissolving injunction previously issued and awarding damages allegedly suffered because of injunction, where chancellor made the finding of the jury his finding, he will be credited with soundness and be charged with the fallacies of the logic and conclusions that entered into the jury's finding. Evans v. Weise, 234 Ark. 137, 350 S.W.2d 616 (1961).

Damages.

This section confers a discretionary power on the circuit court to award damages in any sum not to exceed 10 percent upon the dissolution of an injunction, which the Supreme Court will not assume to control. Moore v. Granger, 30 Ark. 574 (1875).

This section does not prevent a defendant in other cases from filing a cross-complaint asking for the recovery of damages growing out of the issuance of the injunction. Chicot Lumber Co. v. Dardell, 84 Ark. 140, 104 S.W. 1100 (1907).

Where the trial court, in a preliminary decree dissolving an injunction, reserved for future decision the question of damages on account of the issuance of a wrongful injunction, it had no power to render a decree for such damages in a subsequent action, since the matter was involved in the original action and therefore had become res judicata. Harding Constr. Co. v. Drainage Dist. No. 17, 178 Ark. 778, 13 S.W.2d 312 (1929).

This section contemplates a judgment for damages during the life of the temporary injunction only and not for subsequent damages sustained by reason of the injunction being made permanent by an erroneous order of the chancellor, as damages by action of the court are damnum absque injuria. Citizens Pipe Line Co. v. Twin City Pipe Line Co., 183 Ark. 1006, 39 S.W.2d 1017 (1931).

Where temporary restraining order has been dissolved, defendant was entitled to at least nominal damages, but where all costs were adjudged against plaintiff, defendant has, in effect, received nominal damages. Reader R.R. v. Green, 228 Ark. 4, 305 S.W.2d 327 (1957).

Where evidence showed that, except for some minor losses, no damages were suffered as a result of temporary injunction that was dissolved by business that was being liquidated, award was reduced to amount of minor losses. Evans v. Weise, 234 Ark. 137, 350 S.W.2d 616 (1961).

Damages under this section are discretionary with the trial court, and absent an abuse of discretion by the court, its ruling will not be disturbed under ARCP 52. Folk Constr. Co. v. Sun Pipe Line Co., 271 Ark. 836, 611 S.W.2d 198 (1981).

Judgments.

Upon the dissolution of an injunction where an execution at law upon a money judgment is enjoined, the court should remit to the creditor his judgment at law for satisfaction of the judgment and interest, render a decree for not more than 10 percent upon the amount enjoined for damages, and award execution thereon. It is error to render a decree for the amount of the judgment enjoined and interest added as damages. Coblentz v. Wheeler & Wilson Mfg. Co., 40 Ark. 180 (1882).

On dissolution, the court may render judgment on the bond according to its terms. Felker v. Rice, 110 Ark. 70, 161 S.W. 162 (1913).

A temporary injunction issued at the commencement of an action restraining the defendant from enforcing an attachment lien on personal property did not operate as a release of the property from the officer's custody nor discharge the lien; and it was error upon its dissolution to render a decree against the plaintiff for

the amount of the defendant's debt in the absence of proof that the attached property had been lost, damaged, or depreciated in value by reason of the issuance of the restraining order. Johnson v. Gillenwater, 75 Ark. 114, 87 S.W. 439 (1905); Lesser-Goldman Cotton Co. v. Adams, 158 Ark. 10, 249 S.W. 371 (1923).

When execution of judgment is stayed for definite period, court may render judgment on bond on expiration of such period though no formal order dissolving the injunction has been entered. Ford v. Ferguson & Son, 184 Ark. 670, 43 S.W.2d 546 (1931).

Cited: Greer v. Stewart, 48 Ark. 21, 2 S.W. 251 (1886); Stanley v. Bonham, 52 Ark. 354, 12 S.W. 706 (1889); Adcock v. Coker, 105 Ark. 210, 151 S.W. 253 (1912); Shugart v. Sorrells, 133 Ark. 520, 202 S.W. 817 (1918).

16-113-406. Liability of sureties — Notice.

(a) The judgment for damages shall be rendered against the party who obtained the restraining order or injunction and against his or her sureties on the bond, and the judgment for damages shall be conclusive against them.

(b) In proceedings under this subchapter, the sureties shall be considered parties in the cause. The court may, in its discretion, require reasonable notice to the sureties before finding and judgment.

History. Civil Code, § 320; Acts 1915, No. 102, § 2; C. & M. Dig., § 5825; Pope's Dig., § 7541; A.S.A. 1947, § 32-310.

CASE NOTES

Analysis

In general.
Appeals.

In General.

The assessment of damages against the plaintiff is conclusive against the sureties on the injunction bond. Bailey v. Gibson, 29 Ark. 472 (1874); Clayton v. Martin, 31 Ark. 217 (1876) (decisions prior to 1915 amendment).

Appeals.

Judgment against sureties would not be reversed on appeal of principal alone. Daniel v. Daniel, 39 Ark. 266 (1882) (decision prior to 1915 amendment).

CHAPTER 114

MALPRACTICE ACTIONS

SUBCHAPTER.

1. General Provisions.
2. Actions for Medical Injury.
3. Accountants and Attorneys.

CASE NOTES

Malpractice Actions.

By passing the Medical Malpractice Act, the Arkansas General Assembly did not repeal the Wrongful Death Act in cases where the death was caused by a medical injury. Meredith v. Buchman, 101 F. Supp. 2d 764 (W.D. Ark. 2000).

Subchapter 1 — General Provisions

[Reserved]

Subchapter 2 — Actions for Medical Injury

SECTION.
16-114-201. Definitions.
16-114-202. Applicability.
16-114-203. Statute of limitations.
16-114-204. [Repealed.]
16-114-205. Allegation of damages.
16-114-206. Burden of proof.
16-114-207. Expert witnesses.
16-114-208. Damage awards — Periodic payment of future damages.
16-114-209. False and unreasonable pleadings.
16-114-210. Employed medical care provider.
16-114-211. Surveys and inspection reports as evidence.
16-114-212. Tolling of the statute of limitations.

Effective Dates. Acts 1979, No. 709, § 11: Apr. 2, 1979. Emergency clause provided: "It is hereby found, determined and declared by the General Assembly that the threat of legal actions for medical injury have resulted in increased rates for malpractice insurance which in turn causes and contributes to an increase in health care costs placing a heavy burden on those who can least afford such increases and that the threat of such actions contributes to expensive medical procedures to be performed by physicians and others which otherwise would not be considered necessary and that this Act should be given effect immediately to help control the spiraling cost of health care. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2003, No. 649, § 26. Mar. 25, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in this state, existing conditions, such as the application of joint and several liability regardless of the percentage of fault, are adversely impacting the availability and affordability of medical liability insurance; that those existing conditions recently have caused several medical liability carriers to stop offering coverage in the state and have caused some medical care providers to curtail or end their practices; that the decreasing availability and affordability of medical liability insurance is adversely affecting the accessibility and affordability of medical care and of health insurance coverage in this state; that long term care facilities are having great difficulty hiring qualified medical directors because physicians could be held liable for an entire judgment even if they are found to be minimally at fault; and that there is a need to improve access to the courts for deserving claimants; and that this act is immediately necessary in order to remedy these conditions and improve access to health care in this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house."

RESEARCH REFERENCES

ALR. Druggist's civil liability for injuries sustained as result of negligence in incorrectly filling drug prescriptions. 3 ALR 4th 270.

Admitting testimony regarding physician's usual custom or habit in order to establish nonliability. 10 ALR 4th 1243.

Causing patient to become addicted to drugs. 16 ALR 4th 999.

Physician-patient relationship for malpractice purposes. 17 ALR 4th 132.

Standard of care. 18 ALR 4th 603.

Blood transfusion: Liability for injury or death resulting. 20 ALR 4th 136.

Instrument breaking in course of surgery or treatment. 20 ALR 4th 1179.

In personam jurisdiction, under long-arm statute, over nonresident physician, dentist, or hospital in medical malpractice action. 25 ALR 4th 706.

Failure of physician to inform patient of alternative modes of diagnosis or treatment. 38 ALR 4th 900.

Statute providing for periodic payment of future damages in medical malpractice action. 41 ALR 4th 275.

Third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats. 41 ALR 4th 1078.

Misrepresentation of nature and hazards of treatment. 42 ALR 4th 543.

Physician's liability to third person for prescribing drug to known drug addict. 42 ALR 4th 586.

Physician's liability, for injury to or death of third party, due to failure to disclose driving-related impediment. 43 ALR 4th 153.

Revocation of license or other disciplinary action in connection with malpractice action. 44 ALR 4th 248.

Physician's withdrawal of life supports from comatose patient. 47 ALR 4th 18.

Res ipsa loquitur doctrine in action against anesthetist for malpractice. 49 ALR 4th 63.

Am. Jur. 61 Am. Jur. 2d, Phys. & S., § 286 et seq.

Ark. L. Rev. Notes, National Standard of Care — A New Dimension of the Locality Rule, 36 Ark. L. Rev. 161.

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Haase v. Starnes: The Arkansas Supreme Court's Refusal to Require Expert Testimony in Express Warranty Medical Malpractice Litigation, 50 Ark. L. Rev. 731.

Ark. L. Notes. Leflar, Advance Health Care Directives Under Arkansas Law, 1994 Ark. L. Notes 37.

C.J.S. 70 C.J.S., Phys. & S., § 75 et seq.

UALR L.J. Powell, Survey of Torts, 3 UALR L.J. 316.

Survey of Arkansas Law: Torts, 4 UALR L.J. 247.

Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.

Lisk, a physician's respondeat superior liability for the negligent acts of other medical professionals — when the captain goes down without the ship, 13 UALR L.J. 183.

CASE NOTES

Analysis

Constitutionality.
In general.
Construction with other laws.

Constitutionality.

Where a medical malpractice plaintiff contended that this subchapter was unconstitutional in its entirety because it denied equal protection to victims of medical malpractice, because it constituted special legislation, and because it denied or delayed a remedy to medical malpractice victims, but the notice of intent to sue provision, § 16-114-204 (repealed), was the only challenged portion of this subchapter that had been applied to the plaintiff's detriment, the plaintiff had standing to challenge only § 16-114-204 (repealed). Gay v. Rabon, 280 Ark. 5, 652 S.W.2d 836 (1983).

In General.

Actions for medical malpractice are not statutory in origin. Sandusky v. First Elec. Coop., 266 Ark. 588, 587 S.W.2d 37 (1979) (decision under prior law).

Construction With Other Laws.

By passing this subchapter, the Arkansas General Assembly did not repeal the Wrongful Death Act, § 16-62-102, in cases where the death was caused by a medical injury. Meredith v. Buchman, 101 F. Supp. 2d 764 (W.D. Ark. 2000).

Cited: Haney v. DeSandre, 286 Ark. 258, 692 S.W.2d 214 (1985); Southwestern Human Servs. Inst., Inc. v. Mitchell, 287 Ark. 59, 696 S.W.2d 722 (1985); Livingston v. Arkansas State Medical Bd., 288 Ark. 1, 701 S.W.2d 361 (1986); Goodwin v. Harrison, 300 Ark. 474, 780 S.W.2d 518 (1989); Blankenship v. Burnett, 304 Ark. 469, 803 S.W.2d 539 (1991); Oglesby v. Baptist Medical Sys., 319 Ark. 280, 891 S.W.2d 48 (1995); Sosebee v. County Line Sch. Dist., 320 Ark. 412, 897 S.W.2d 556 (1995); Norris v. Bakker, 320 Ark. 629, 899 S.W.2d 70 (1995).

16-114-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Action for medical injury" means any action against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of medical injury;

(2) "Medical care provider" means a physician, certified registered nurse anesthetist, physician's assistant, nurse, optometrist, chiropractor, physical therapist, dentist, podiatrist, pharmacist, veterinarian, hospital, nursing home, community mental health center, psychologist, clinic, or not-for-profit home health care agency licensed by the state or otherwise lawfully providing professional medical care or services, or an officer, employee or agent thereof acting in the course and scope of employment in the providing of such medical care or medical services; and

(3) "Medical injury" or "injury" means any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

History. Acts 1979, No. 709, § 1; A.S.A. 1947, § 34-2613.

RESEARCH REFERENCES

Ark. L. Rev. Note, Schmidt v. Gibbs: The Application of Res Ipsa Loquitur to Arkansas Medical Malpractice Litigation, 46 Ark. L. Rev. 397.

Wrongful Death Damages Under the Arkansas Medical Malpractice Act: Would a Change Make Cents?, 54 Ark. L. Rev. 577 (2001).

CASE NOTES

Analysis

Constitutionality.
Construction.
Medical injury.
Professional services.

Constitutionality.

Statute of limitations in the Medical Malpractice Act, § 16-114-201 et seq., has a rational basis and it does not deprive a claimant of a constitutional right to a redress of wrongs or a jury trial, nor does it violate the right to equal protection. Davis v. Parham, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Medical Malpractice Act, § 16-114-201 et seq., in its entirety passes the rational-basis test; there is a clear rational relationship between the burden of proof required and the achievement of the legitimate governmental objective of reducing healthcare costs. Davis v. Parham, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Construction.

A pharmacy is a medical care provider within the meaning of this subchapter and the reference to a pharmacist in subdivision (2) of this section should be deemed to include a pharmacy. Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885 (W.D. Ark. 1999).

Two-year limitations period of Medical Malpractice Act, § 16-114-201 et seq., conflicts with the three-year limitations period provided under the Wrongful Death Act, § 16-62-102(c) and is therefore controlling where death ensues from medical injuries. Davis v. Parham, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Medical Injury.

Patient was under a doctor's care while he was in the nursing home, but his death from leaving unnoticed in a wheelchair and being struck by a car, was not the result of a "medical injury"; instead, the question was whether the patient was properly supervised by the one LPN and five nurse's aides on duty that night. The answer to this question merely requires the jury to decide whether the nursing home used ordinary care in furnishing the patient the care and attention reasonably required by his mental and physical condition. Bailey v. Rose Care Ctr., 307 Ark. 14, 817 S.W.2d 412 (1991).

The actions of a licensed practical nurse in revealing confidential information she acquired at work did not fall within subdivision (3)'s definition of a medical injury. Wyatt v. Saint Paul Fire & Marine Ins. Co., 315 Ark. 547, 868 S.W.2d 505 (1994).

Subdivision (3) of this section defines "medical injury" sufficiently broadly; claims based on allegations of a failure to provide needed medical care and attention or the timely diagnosis of medical problems come within the ambit of this subchapter and are dependent upon expert testimony as outlined in § 16-114-206(a). Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 (1995).

Broad language in this section defining "medical injury" encompasses a cause of action for failure to diagnose child abuse. First Com. Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996), supp. op., 323 Ark. 406, 917 S.W.2d 167 (1996).

Where husband and wife were receiving treatment at a counseling center, wife did not suffer a medical injury from the center's failure to end an affair which developed between the center's receptionist and the husband. Howard v. Ozark Guidance Ctr., 326 Ark. 224, 930 S.W.2d 341 (1996).

A claim for adverse consequences arising from an allegedly defective product supplied in the course of rendering a surgical procedure falls within the definition of medical injury as well as actions based on strict or products liability. Adams v. Arthur, 333 Ark. 53, 969 S.W.2d 598 (1998).

The defendants were not entitled to summary judgment in an action in which a decedent's estate alleged that the decedent died as the result of injuries sustained while a resident in a nursing home and that the employees of the nursing home were negligent because they intentionally abused the decedent, failed to use ordinary care in properly supervising the decedent, or failed to follow a physician's order that the decedent be restrained since a question existed as to whether the injuries sustained by the decedent were medical injuries sustained while the decedent was thrashing about in bed or

whether there was a negligent breach by custodial personnel of the physician's orders to restrain the decedent, causing a fall that resulted in her injuries. Loewer v. Cla-Cliff Nursing & Rehab. Ctr., 344 Ark. 258, 39 S.W.3d 771 (2001).

Professional Services.

A hospital is required to consider the patient's capacity to care for himself and to protect the patient from dangers created by his weakened condition; providing a safe environment for patients is within the scope of the professional services by a hospital. Sexton v. St. Paul Fire & Marine Ins. Co., 275 Ark. 361, 631 S.W.2d 270 (1982).

A physician's actions in improperly touching or fondling his patients' breasts did not constitute the rendering of professional services, despite the fact that the touching occurred during physical examinations at the physician's office. McQuay v. Guntharp, 336 Ark. 534, 986 S.W.2d 850 (1999).

The drug manufacturer may rely on the prescribing physician to warn the ultimate user of the risk of a prescription drug, and pharmacies generally have no common-law or statutory duty to warn customers of the risks associated with the prescription drugs they purchase, unless there is evidence the pharmacy compounded the drug or changed the drug in some manner after receiving it from the manufacturer. Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885 (W.D. Ark. 1999).

Cited: Dawson v. Gerritsen, 290 Ark. 499, 720 S.W.2d 714 (1986); HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988); Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988); Cox v. Bard, 302 Ark. 1, 786 S.W.2d 570 (1990); Weidrick v. Arnold, 310 Ark. 138, 835 S.W.2d 843 (1992); Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999); Pastchol v. St. Paul Fire & Marine Ins. Co., 326 Ark. 140, 929 S.W.2d 713 (1996); Dodson v. Charter Behavioral Health Sys., 335 Ark. 96, 983 S.W.2d 98 (1998); Dooley v. CapCare of Ark., Inc., 338 F. Supp. 2d 962 (E.D. Ark. 2004).

16-114-202. Applicability.

This subchapter applies to all causes of action for medical injury accruing after April 2, 1979, and, as to such causes of action, shall supersede any inconsistent provision of law.

History. Acts 1979, No. 709, § 9; A.S.A. 1947, § 34-2620n.

CASE NOTES

Analysis

In general.
Medical injury.
Negligence.
Res ipsa loquitur.
Statute of limitations.
Wrongful death.

In General.

This subchapter is only applicable to professional services. Sexton v. St. Paul Fire & Marine Ins. Co., 275 Ark. 361, 631 S.W.2d 270 (1982).

Medical Injury.

Section 16-114-201(3) defines "medical injury" sufficiently broadly; claims based on allegations of a failure to provide needed medical care and attention or the timely diagnosis of medical problems come within the ambit of this subchapter and are dependent upon expert testimony as outlined in § 16-114-206(a). Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 (1995).

Negligence.

The trial court erred in treating a medical malpractice claim as an ordinary negligence claim, and in permitting the issues raised by the medical malpractice claim to rest on lay testimony. Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 (1995).

Res Ipsa Loquitur.

In action under this section, the trial

court properly refused the proffered instruction on res ipsa loquitur where all of the essential elements were not present. National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996).

Statute of Limitations.

This subchapter's two-year statute superseded the Products Liability three-year statute of limitations to govern plaintiff's product-liability claims brought against a drug company for medical injury as a result of taking the diet drug popularly known as Fen/Phen. Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885 (W.D. Ark. 1999).

Wrongful Death.

The limitations period provided under this subchapter conflicts with the limitations period provided under the Wrongful Death Act, § 16-62-102; pursuant to this subchapter, § 16-62-102's statute of limitations, as an inconsistent provision of law, is superseded by § 16-114-203's statute of limitations where the two conflict. Hertlein v. St. Paul Fire & Marine Ins. Co., 323 Ark. 283, 914 S.W.2d 303 (1996).

Cited: HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988); Howard v. Northwest Ark. Surgical Clinic, 324 Ark. 375, 921 S.W.2d 596 (1996).

16-114-203. Statute of limitations.

(a) Except as otherwise provided in this section, all actions for medical injury shall be commenced within two (2) years after the cause of action accrues.

(b) The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time. However, where the action is based upon the discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such two-year period, the action may be commenced within one (1) year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier.

(c)(1) If an individual is nine (9) years of age or younger at the time of the act, omission, or failure complained of, the minor or person claiming on behalf of the minor shall have until the later of the minor's eleventh birthday or two (2) years from the act, omission, or failure in which to commence an action.

(2) However, if no medical injury is known and could not reasonably have been discovered prior to the minor's eleventh birthday, then the minor or his representative shall have until two (2) years after the medical injury is known or reasonably could have been discovered, or until the minor's nineteenth birthday, whichever is earlier, in which to commence an action.

History. Acts 1979, No. 709, § 4; A.S.A. 1947, § 34-2616; Acts 1991, No. 997, § 1; 1995, No. 735, § 1.

Cross References. Commencement of new action after nonsuit or judgment arrested or reversed, § 16-56-126.

Persons under disabilities at time of accrual of action, § 16-56-116.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments, Thompson v. Dunn, 889 S.W.2d 31 (1994), 48 Ark. L. Rev. 885.

Prognosis Questionable: An Examination of the Constitutional Health of Arkansas Medical Malpractice Statute of Repose, 50 Ark. L. Rev. 691.

UALR L.J. Note, Torts — Limitations

on Actions — Arkansas Adopts Continuous Treatment Rule to Toll Statute of Limitations in Medical Malpractice Actions. Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988), 11 UALR L.J. 405.

Survey — Property, 12 UALR L.J. 225.

CASE NOTES

Analysis

Constitutionality.
In general.
Construction.
Accrual of cause of action.
Actions barred.
Actions not barred.
Appeals.
Continuing tort.
Continuing treatment doctrine.
Discovery of foreign objects.
Fraudulent concealment.
Tolling of statute.
Waiver.
Wrongful death.

Constitutionality.

Two-year statute of limitations for medical malpractice actions, absent fraudulent concealment, is not too short a time as to deprive patients of due process of law. Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976) (decision under prior law).

Plaintiff lacked standing to challenge this section on grounds that it violates the "open door" provision of Ark. Const., Art. 2, § 13. Morrison v. Jennings, 328 Ark. 278, 943 S.W.2d 559 (1997).

The statutory distinction between foreign-object medical malpractice claimants and typical medical malpractice claimants does not violate equal protection since a rational basis exists for the distinction in light of staleness considerations that are not as likely present in foreign-object cases. Adams v. Arthur, 333 Ark. 53, 969 S.W.2d 598 (1998).

In General.

Former similar statute which stated all tort actions for medical malpractice must be brought within two years merely fixed the time in which action could be filed, and did not create a right, as it already existed. Partin v. Wade, 172 F.2d 50 (8th Cir. 1949) (decision under prior law).

Any action alleging medical malpractice must be brought within two years after the cause of action accrues. Gilpin v. Tack, 256 F. Supp. 562 (W.D. Ark. 1966) (decision under prior law).

The limitations period on medical malpractice claims under Arkansas law is two years in most circumstances. Burrows v. Turner Mem. Hosp., 762 F. Supp. 840 (W.D. Ark. 1991).

The two-year statute of limitations and the tolling provision of § 16-114-203 supersede the three-year period that § 16-56-116 allows after a disability is removed for persons insane at the time the right of action accrued. Smith v. Diversicare Leasing Corp. of Am., 65 Ark. App. 138, 985 S.W.2d 749 (1999).

Construction.

The limitation in this section has consistently been strictly construed, commencing the two-year period from the date of the act of alleged malpractice; although the continuous treatment doctrine has been adopted, the Supreme Court has refused to recognize other doctrines which would ameliorate the strictness of the requirement. Green v. National Health Lab., Inc., 316 Ark. 5, 870 S.W.2d 707 (1994).

Former § 16-114-204 (repealed) was invalidated in its entirety by Weidrick v. Arnold, 310 Ark. 138, 835 S.W.2d 843 (1992); the two-year statute of limitations set forth in subsection (a) of this section is controlling. Parmley v. Moose, 317 Ark. 52, 876 S.W.2d 243 (1994).

This section is irrelevant when a patient dies from his injuries before the two-year period has run. Brown v. St. Paul Mercury Ins. Co., 292 Ark. 558, 732 S.W.2d 130 (1987), overruled on other grounds, Bailey v. Rose Care Ctr., 307 Ark. 14, 817 S.W.2d 412 (1991); Brown v. Saint Paul Mercury Ins. Co., 308 Ark. 361, 823 S.W.2d 908 (1992).

Wrongful death statute of limitations, and not medical malpractice statute of limitations, applied to action for damages for loss of consortium, mental anguish, and funeral expenses for the death of the decedent, even though his death was the result of a medical injury. Brown v. St. Paul Mercury Ins. Co., 292 Ark. 558, 732 S.W.2d 130 (1987), overruled on other

grounds, Bailey v. Rose Care Ctr., 307 Ark. 14, 817 S.W.2d 412 (1991).

Where statute of limitations applicable to medical malpractice actions at the time of patient's original surgery provided that an action must be brought within two years after the action's accrual, the fact that a new limitation period was enacted before patient's action was barred did not repeal the previous applicable section for actions already accrued. Sheridan v. Struble, 977 F.2d 1229 (8th Cir. 1992).

Former § 16-114-204 has been superseded and the sixty-day notice requirement and its accompanying ninety-day grace period no longer exist; the two-year limitations period of this section is controlling, notwithstanding compliance with § 16-114-204. Baker v. Milam, 321 Ark. 234, 900 S.W.2d 209 (1995).

The limitations period provided under this subchapter conflicts with the limitations period provided under the Wrongful Death Act, § 16-62-102; the wrongful death statute of limitations, as an inconsistent provision of law, is superseded by this section where the two conflict. Hertlein v. St. Paul Fire & Marine Ins. Co., 323 Ark. 283, 914 S.W.2d 303 (1996).

Where the alleged cause of the decedent's death is a medical injury, the two-year statute of limitations provided by this section, rather than the three-year statute of limitations in § 16-62-102, is applicable. Morrison v. Jennings, 328 Ark. 278, 943 S.W.2d 559 (1997).

This section's two-year limitations period is controlling where death ensues from medical injuries accruing after April 2, 1979. Looney v. Bolt, 330 Ark. 530, 955 S.W.2d 509 (1997).

Two-year limitations period of Medical Malpractice Act, § 16-114-201 et seq., conflicts with the three-year limitations period provided under the Wrongful Death Act, § 16-62-102(c) and is therefore controlling where death ensues from medical injuries. Davis v. Parham, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Accrual of Cause of Action.

An amendment to a medical malpractice complaint relates back to the filing of the original complaint, unless a new cause of action is stated by the amendment. Williams v. Edmondson, 257 Ark. 837, 520 S.W.2d 260 (1975) (decision under prior law).

In an action against physicians for negligence in reading decedent's x-rays, the statute of limitations commenced running when the x-rays were read, and such commencement was not delayed until discovery of the negligence on the theory that it was a continuing tort. Williams v. Edmondson, 257 Ark. 837, 520 S.W.2d 260 (1975) (decision under prior law).

Former statute commenced to run when alleged negligence took place, absent fraudulent concealment. Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976) (decision under prior law).

If the treatment by the doctor is a continuing course and the patient's illness, injury, or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, this section does not commence running until treatment by the doctor for the particular disease or condition involved has terminated — unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive. Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988).

Where a patient was clearly under a continuing course of treatment by physician, the limitations period did not begin to run until the patient's treatment terminated; to hold otherwise might require a plaintiff to bring suit against his or her physician before treatment is even terminated, and such a result could conceivably afford the physician a defense that a patient left before treatment was terminated and before the physician had a chance to effectuate a proper result. Taylor v. Phillips, 304 Ark. 285, 801 S.W.2d 303 (1990).

The evidence presented on the issue of whether this section barred the claim did not entitle the defendants to a summary judgment. Green v. National Health Lab., Inc., 316 Ark. 5, 870 S.W.2d 707 (1994).

Actions Barred.

Where more than three years after patient's release from the medical center where she had been committed for psychiatric observation, patient filed a second amended complaint alleging for the first time negligence on psychiatrist's part, any cause of action for negligence was barred either by two-year statute applicable to medical malpractice or by the three-year statute applicable to actions for personal

injuries. Turner v. Baptist Medical Center, 275 Ark. 424, 631 S.W.2d 275 (1982) (decision under prior law).

Plaintiff's medical malpractice action for injury resulting from a misdiagnosis was barred by this section where it was filed nine years after the misdiagnosis occurred, but within two years of the time the plaintiff discovered that the defendant had misdiagnosed her condition. Treat v. Kreutzer, 290 Ark. 532, 720 S.W.2d 716 (1986).

Where parents did not even become parties to the action, and then only as guardians, until the second amended complaint, which was filed over two years after last wrongful act complaint occurred, their claims were time barred. National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996).

Where plaintiff filed a medical malpractice action on March 4, 1994, two days short of the two-year statute of limitations under subsection (a) of this section, and had until July 2, 1994, to complete service of process pursuant to ARCP 4(1), requested another 120 days on June 23, 1994, and was granted a 30-day extension on July 28, 1994, and where plaintiff, after failing to obtain service, requested a nonsuit on August 18, 1994, which was granted on September 14, 1994, the claim refiled on August 11, 1995, had not invoked the one-year savings statute, § 16-56-126, and was barred by the statute of limitations. Thomson v. Zufari, 325 Ark. 208, 924 S.W.2d 796 (1996).

Claim brought within two years after the decedent's death, but over two years since the doctor last saw the patient and the cause of action accrued, was held barred by this section. Morrison v. Jennings, 328 Ark. 278, 943 S.W.2d 559 (1997).

Because the date of the accrual of the cause of action for medical malpractice is the date of the wrongful act complained of and plaintiff filed her suit more than two years after she last filled a prescription for the diet drugs popularly known as Fen/Phen, any claims she had against the pharmacy defendants were barred by the statute of limitations. Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885 (W.D. Ark. 1999).

Patient's medical malpractice claim based on a surgery performed when he was minor, which was filed when patient reached age of majority five years after the cause of action accrued, was barred by the two-year statute of limitation under this section. Raley v. Wagner, 346 Ark. 234, 57 S.W.3d 683 (2001).

Although the estate contended that the statute of limitations did not bar an action for medical negligence when the resulting damages occurred many years later, the statute of limitations began to run from the date that the negligent act occurred and the court specifically declined to abandon the traditional rule for applying the statute. Harris v. Ozment, 83 Ark. App. 94, 117 S.W.3d 647 (2003).

Where appellants' attorneys, who were licensed in Oklahoma but not in Arkansas, filed appellants' medical malpractice complaint on the last day of the limitations period but did not file motions for admission pro hac vice until eight months later, the trial court properly dismissed the complaint; since Ark. R. Admis. Bar. XIV required that the pro hac vice motions be filed before the attorneys practiced law in Arkansas, the complaint was a nullity and, thus, no valid complaint was filed within the limitations period. Preston v. Univ. of Ark. for Med. Scis., 354 Ark. 666, 128 S.W.3d 430 (2003).

Where couple's attorneys were unauthorized to practice law in Arkansas, their medical malpractice complaint was a nullity, as if it had never been filed, and since the limitations for medical malpractice expired on November 19, 2001, the day the complaint was filed, no valid complaint was filed within the required two-year period. Preston v. Univ. of Ark. for Med. Scis., 354 Ark. 666, 128 S.W.3d 430 (2003).

Wrongful death action filed against healthcare providers by a decedent's parents was void ab initio where the decedent had no personal representative and the complaint failed to include as a plaintiff the decedent's half-brother; hence, subdivision (c)(1) of this section did not apply to allow the parents to add the half-brother after the limitations period had run. Andrews v. Air Evac EMS, Inc., 86 Ark. App. 161, 170 S.W.3d 303 (2004).

In a wrongful death action filed by the special administrator of decedent's estate, the trial court properly granted the doctors' motion to dismiss for lack of subject matter jurisdiction because the suit was filed before the order appointing the ad-

ministrator was filed with the court clerk and the administrator did not re-file the suit before the expiration of the two-year limitations; under Ark. R. Civ. P. 58 and Ark. Sup. Ct. Admin. Order No. 2, the order appointing the administrator was not effective until it was filed with the clerk of court, therefore, the complaint was a nullity. Filyaw v. Bouton, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 610 (Sept. 15, 2004).

Since family did not name decedent's siblings as plaintiffs in a lawsuit against defendants for medical malpractice as required by § 16-62-102 where probate had not been opened, the complaint was a nullity and summary judgment in favor of defendants was proper; siblings were not named until after statute of limitations in this section expired. Rice v. Tanner, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 417 (June 23, 2005).

Actions Not Barred.

Where plaintiff filed a tort action for malpractice against the defendant within two-year period of limitations and took a nonsuit, plaintiff could maintain a second suit based on same cause of action where filed within one year of the nonsuit, though second action was filed more than two years after the occurrence of the tort. Partin v. Wade, 172 F.2d 50 (8th Cir. 1949) (decision under prior law).

Physician was not estopped from pleading statute of limitations in a malpractice action because of the fiduciary relationship between the doctor and patient. Williams v. Edmondson, 257 Ark. 837, 520 S.W.2d 260 (1975) (decision under prior law).

Since it is the issuance of a summons and placing it in the hands of the sheriff of the proper county, not its serving, that commences an action, where summons was issued but not served and a second summons issued after the running of the statute of limitations, the action was not barred, since the action commenced with the issuing of the first summons before the statute had run. Williams v. Edmondson, 257 Ark. 837, 520 S.W.2d 260 (1975) (decision under prior law).

The dismissal of the original complaint without prejudice extended for one year the limitations period for that cause of action. Burrows v. Turner Mem. Hosp., 762 F. Supp. 840 (W.D. Ark. 1991).

Appeals.

Court order denying motion for summary judgment, holding statute of limitations to be unconstitutional insofar as it denied a remedy to the plaintiff, was not appealable. Ross v. McDaniel, 252 Ark. 253, 478 S.W.2d 430 (1972) (decision under prior law).

Continuing Tort.

The misreading of a pap smear was not a continuing tort, accruing freshly until the mistake was discovered, but was a single wrongful act. Humphreys v. Roche Biomedical Lab., Inc., 990 F.2d 1078 (8th Cir. 1993).

With one exception, Arkansas courts do not recognize either the discovery rule or a continuing tort theory in the context of medical malpractice cases. Humphreys v. Roche Biomedical Lab., Inc., 990 F.2d 1078 (8th Cir. 1993).

Where there was a single, isolated act of alleged medical malpractice involving the choice of the particular procedure used during a foot surgery, and where the procedure actually used on the patient's foot was correctly performed, the informal, weekly trimming of the patient's calluses did not amount to a series of negligent acts or continuing course of improper treatment sufficient to toll the statute of limitations. Hobbs v. Naples, 993 F.2d 173 (8th Cir. 1993).

The continuous-treatment doctrine does not apply to toll this section coextensively with the physician-patient relationship, even if no continuing treatment occurs. Raynor v. Kyser, 338 Ark. 366, 993 S.W.2d 913 (1999).

Where there is no more physician-patient interaction occurring other than the scheduling of future visits, the continuous treatment does not apply to toll the statute of limitations. Raynor v. Kyser, 338 Ark. 366, 993 S.W.2d 913 (1999).

The period between January 1985 and October 1994 was barred by the statute of limitations, notwithstanding the plaintiff's assertion of the continuous treatment theory, where it was undisputed that the plaintiff did not seek treatment for her nasal polyps from March 1991 until October 1994, even though she had been instructed to schedule a follow-up appointment six months after her March 1991 visit. Raynor v. Kyser, 64 Ark. App. 365, 984 S.W.2d 451 (1998).

The statute of limitations began to run from the time of the plaintiff's last post-operative follow-up examination, notwithstanding that she was instructed to come back again in six months and that she did return to the defendant doctor about four months later, since that visit was prompted by unrelated concerns and the plaintiff did not mention the surgery during that visit. Raynor v. Kyser, 64 Ark. App. 365, 984 S.W.2d 451 (1998).

The continuous course of treatment doctrine did not apply in an action for medical malpractice arising from the reading of the plaintiff's annual mammograms since each mammogram was a single, isolated act of alleged negligence. Baker v. Radiology Assocs., 72 Ark. App. 193, 35 S.W.3d 354 (2000).

Continuing Treatment Doctrine.

The continuing treatment doctrine did not apply to toll the statute of limitations in a medical malpractice action, notwithstanding that the plaintiff amended his complaint to allege that the defendant physician "failed to properly and adequately treat, diagnose and repair the medical conditions ... incurred as a result of the previous] surgical procedures," where it was clear the alleged injuries and damages stemmed from the surgeries themselves, rather than the follow-up care, and that the injuries were not of a cumulative nature that prevented the court from identifying which individual acts caused the damages. Hicks v. Armstrong, 253 F.3d 1072 (8th Cir. 2001).

Appellate court reversed a grant of summary judgment in favor of a doctor and clinic as husband was prevented from completing discovery that might have established that the continuous-treatment doctrine tolled the statute of limitations in his medical malpractice claim involving the death of his wife. Pledger v. Carrick, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 276 (May 5, 2005).

Discovery of Foreign Objects.

Action for malpractice based on operation performed in 1926 where patient knew within seven or eight weeks that something was causing her to suffer but did not discover that a gauze had been left in her body until another operation in 1936, absent allegation of fraudulent concealment by physician, was barred by former statute. Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520 (1939) (decision under prior law).

Where the "foreign objects" are discovered within the two-year period, the exception in subsection (b) is not applicable and the action still needs to be commenced within two years of the date of the wrongful act complained of; the one-year extension applies only if the object is not discovered, and could not reasonably have been discovered, within the two-year period. Thompson v. Dunn, 319 Ark. 6, 889 S.W.2d 31 (1994).

Where the presence of a foreign object left in a patient is concealed by the physician, the act of concealment is part of the wrongful act, and the cause of action does not accrue until the concealment ends. Howard v. Northwest Ark. Surgical Clinic, 324 Ark. 375, 921 S.W.2d 596 (1996).

Fraudulent Concealment.

Doctor's reference in a discharge summary to the conclusions of another doctor held not to constitute fraudulent concealment. Morrison v. Jennings, 328 Ark. 278, 943 S.W.2d 559 (1997).

Doctor was under an affirmative duty to inform patient that he had removed her only remaining ovary during surgery to remove her bladder, and his failure to disclose removal of patient's ovary constituted fraudulent concealment, tolling the statute of limitations. Roberts v. Francis, 128 F.3d 647 (8th Cir. 1997).

There was no fraudulent concealment sufficient to toll the statute of limitations in a medical malpractice action where the defendant physician allegedly misrepresented the nature of the product Orthoblock; this is a question regarding the efficacy of the material to be used, and not a fraudulent concealment of a negligent act. Johnson v. Arthur, 65 Ark. App. 220, 986 S.W.2d 216 (1999).

There was no fraudulent concealment sufficient to toll the statute of limitations where the plaintiffs alleged facts that only amounted to a failure to inform and a continuation of a prior nondisclosure. Martin v. Arthur, 65 Ark. App. 276, 986 S.W.2d 143 (1999).

The repealer clause added to the savings statute found in § 16-56-116 does not have the effect of repealing the specific savings statute enacted for minor children in this section. Shelton v. Fiser, 340 Ark. 89, 8 S.W.3d 557 (2000).

Where child did not fall within either of the two exceptions for a minor's cause of action under subsection (c) of this section, the complaint brought on his behalf was barred by the two-year statute of limitations in § 16-56-116. Shelton v. Fiser, 340 Ark. 89, 8 S.W.3d 557 (2000).

There was no fraudulent concealment arising from a misstatement in the plaintiff's medical records regarding the size of her reconstructive breast implant, which report was relied on by a physician replacing the implant and led to his not having the correct size implant available during surgery, since (1) the act allegedly perpetrated was not done in such a way that it concealed itself, and, on the contrary, was part of the plaintiff's medical record, (2) there was no evidence that the defendant actually knew of the error in his report, (3) there was no evidence that the defendant was ever informed of the error in his report, and (4) the plaintiff could easily have detected the error by merely requesting her medical records in their entirety. Meadors v. Still, 344 Ark. 307, 40 S.W.3d 294 (2001).

Tolling of Statute.

Statute of limitations does not bar suit if there has been fraudulent concealment of cause of action. Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953) (decision under prior law).

Issue as to whether fraudulent concealment tolled statute was for jury where doctor did not advise patient that he had used wire to close operational wound, though presence of wire was easily ascertained by another doctor. Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953) (decision under prior law).

Knowledge of the wrong done on the part of the physician is a necessary prerequisite to a tolling of the statute of limitations; thus where a doctor negligently read a patient's X ray thereby causing concealment of patient's disease there was no tolling of the statute. Williams v. Edmondson, 257 Ark. 837, 520 S.W.2d 260 (1975) (decision under prior law).

Summary judgment on the ground that the two-year statute of limitations had expired was proper in a medical malpractice action, where the patient's continued ingestion of medicine prescribed by her physician was not enough to establish an on-going course of treatment for the purpose of applying the continuous treatment doctrine in order to toll the statute of limitations until treatment was discontinued. Tullock v. Eck, 311 Ark. 564, 845 S.W.2d 517 (1993).

Where defendant did nothing to prevent plaintiff from discovering the falsity of his reputed representation, plaintiff failed to show an affirmative act of concealment, and her cause of action advanced under either a medical injury or invasion of privacy theory accrued on her last treatment date. Norris v. Bakker, 320 Ark. 629, 899 S.W.2d 70 (1995).

The limitations period of this section is not tolled during the period after the decedent dies but before the doctor issues a written report. Morrison v. Jennings, 328 Ark. 278, 943 S.W.2d 559 (1997).

Where a patient is able to identify the specific negligent treatment that caused her injury, the continuous treatment doctrine does not toll the statute of limitations. Roberts v. Francis, 128 F.3d 647 (8th Cir. 1997).

The continuous treatment doctrine which tolls this section's limitations period becomes relevant when the medical negligence consists of a series of negligent acts, or a continuing course of improper treatments. Wright v. Sharma, 330 Ark. 704, 956 S.W.2d 191 (1997).

There will not always be genuine issues of material fact as to fraudulent concealment in all informed consent cases so as to defeat a motion for summary judgment based on the expiration of the statute of limitations; there must be something more than nondisclosure or a continuation of that nondisclosure to toll the limitations period. Adams v. Arthur, 333 Ark. 53, 969 S.W.2d 598 (1998).

Suit by the administrator of decedent's estate for wrongful death resulting from alleged medical malpractice was time-barred because it had not been filed within two years of the decedent's death as required by this section; although the suit had been filed within one year of the date on which a previous suit against the same healthcare providers filed by the decedent's heirs had been non-suited, the estate had not been a party to the first action and could not, therefore, rely on the saving provision contained in § 16-56-126 to overcome the running of the statute of

limitations. Tatus v. Hayes, 79 Ark. App. 371, 88 S.W.3d 864 (2002).

Statute of limitations had run on a medical malpractice action and had not been tolled where the estate administrator's claims related to the failure of the physicians and clinic to inform decedent of the aortic aneurysm, failure to diagnose, failure to read the x-ray correctly, and failure to provide follow-up care; thus, none of the points rose to the level of a positive act of fraud sufficient to have tolled the statute. Davis v. Parham, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Waiver.

Affirmative acts by plaintiff's agents and attorney did not waive notice requirement under subsection (a). Ofili v. Osco Drug, Inc., 300 Ark. 431, 780 S.W.2d 11 (1989); Hailey v. Kemp, 300 Ark. 120, 776 S.W.2d 828 (1989).

Wrongful Death.

Any medical injury, even one resulting in death, is governed by this section and not the wrongful death statute of limitations found in § 16-62-102. Pastchol v. St. Paul Fire & Marine Ins. Co., 326 Ark. 140, 929 S.W.2d 713 (1996).

When a death results from a medical injury, a resulting lawsuit must be filed within the two-year limitations period of the Medical Malpractice Act, not within the three-year period of the Wrongful Death Act. Scarlett v. Rose Care, Inc., 328 Ark. 672, 944 S.W.2d 545 (1997).

Medical malpractice in a wrongful death action was controlled by the 2-year medical malpractice statute of limitations in this section, and the action was barred where the alleged negligence occurred on January 26 and 29, 2001, and the complaint was filed on February 25, 2004, more than 3 years from the date of the alleged misreadings of deceased's chest x-rays. Davis v. Parham, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 300 (May 12, 2005).

Cited: Gay v. Rabon, 280 Ark. 5, 652 S.W.2d 836 (1983); Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984); McEntire v. Malloy, 288 Ark. 582, 707 S.W.2d 773 (1986); Dawson v. Gerritsen, 290 Ark. 499, 720 S.W.2d 714 (1986); HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988); Green v. Wiggins, 304 Ark. 484, 803 S.W.2d 536 (1991); Black v. Crawley, 304 Ark. 716, 804 S.W.2d 366 (1991); Chapman v. Alexander, 307 Ark. 87, 817 S.W.2d 425 (1991); Brown v. Saint Paul Mercury Ins. Co., 308 Ark. 361, 823 S.W.2d 908 (1992); Weidrick v. Arnold, 310 Ark. 138, 835 S.W.2d 843 (1992); Thomas v. Cornell, 316 Ark. 366, 872 S.W.2d 370 (1994); Williams v. Hudson, 320 Ark. 635, 898 S.W.2d 465 (1995); Pugh v. Griggs, 327 Ark. 577, 940 S.W.2d 445 (1997); McQuay v. Guntharp, 331 Ark. 466, 963 S.W.2d 583 (1998); Adams v. Arthur, 333 Ark. 53, 969 S.W.2d 598 (1998).

16-114-204. [Repealed.]

Publisher's Notes. This section, concerning notice of intent to sue, was repealed by Acts 1995, No. 1296, § 63. The section was derived from Acts 1979, No. 709, § 5; A.S.A. 1947, § 34-2617; Acts 1991, No. 346, § 1.

16-114-205. Allegation of damages.

(a) In any action for medical injury, the declaration or other affirmative pleading shall not specify the amount of damages claimed but shall, instead, contain a general allegation of damage and shall state that the damages claimed are within any minimum or maximum jurisdictional limits of the court to which the pleading is addressed.

(b) At any time after service of the pleading, the defendant may, by special interrogatory, demand a statement of the amount of damages claimed by the plaintiff, which shall be answered within thirty (30) days.

History. Acts 1979, No. 709, § 6; A.S.A. 1947, § 34-2618.

CASE NOTES

Damages Specified.

Where appellants violated this section by specifying their damages rather than alleging a general claim for damages, the trial court misapplied ARCP 15(a), and abused its discretion by striking an amended complaint and dismissing the original complaint without prejudice, where appellee did not show any resulting prejudice or undue delay as a result of the filing of the amendment. Travis v. Houk, 307 Ark. 84, 817 S.W.2d 207 (1991).

Cited: HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988); Cox v. Bard, 302 Ark. 1, 786 S.W.2d 570 (1990).

16-114-206. Burden of proof.

(a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

(1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;

(2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

(3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

(b)(1) Without limiting the applicability of subsection (a) of this section, when the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not supply that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience at the time of the treatment, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.

(2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

(A) Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person or persons giving consent on his or her behalf could reasonably be expected to know of

the risks or hazards inherent in such treatment, procedure, or surgery;

(B) Whether the injured party or the person giving consent on his or her behalf knew of the risks or hazards inherent in such treatment, procedure, or surgery;

(C) Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved or whether he or she did not wish to be informed thereof; and

(D) Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the injured person's condition.

History. Acts 1979, No. 709, § 2; A.S.A. 1947, § 34-2614; Acts 2003, No. 649, § 18.

Amendments. The 2003 amendment inserted "when the asserted negligence ...of common knowledge" in the introductory paragraph of (a); inserted "By means of expert testimony...the defendant" in (a)(1) and (a)(2); inserted "By means of expert...medical expert that" in (a)(3); and made gender neutral and minor punctuation changes.

RESEARCH REFERENCES

ALR. Liability of dentist for extraction of teeth-Lack of informed consent.

Ark. L. Rev. Haase v. Starnes: The Arkansas Supreme Court's Refusal to Require Expert Testimony in Express Warranty Medical Malpractice Litigation, 50 Ark. L. Rev. 731.

UALR L.J. Survey — Torts, 10 UALR L.J. 245.

Survey, Torts, 14 UALR L.J. 417.

Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Civil Justice Reform Act of 2003, 26 UALR L.J. 442.

CASE NOTES

Analysis

Constitutionality.
Applicability.
Breach of warranty.
Duty to disclose risks.
Evidence.
Expert testimony.
Jury instructions.
Lay testimony.
Proximate cause.
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Constitutionality.

Plaintiff's argument that this subchapter violates the prohibition against special legislation in Ark. Const., Art. 5, § 25 held without merit. Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999).

Even assuming that patient and physician had a contract for physician to perform hair transplant, it was not an existing contract when the General Assembly enacted this subchapter; accordingly, this section did not violate the federal contract clause in the case. Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999).

Subsection (b) of this section, which sets forth the burden of proof for plaintiffs in medical malpractice cases involving informed consent, is constitutional because there is a rational relationship between the burden of proof required and the achievement of a legitimate governmental objective; therefore, summary judgment was properly granted in favor of a physician who submitted an affidavit of an expert regarding proper standard of care because a patient failed to offer an affidavit from his own expert witness. Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 (2002).

Applicability.

An action by an administrative board, reviewing the conduct of a professional and ultimately punishing that professional, was not an "action for medical injury," because it was not an action to recover damages; this section was therefore inapplicable. Livingston v. Arkansas State Medical Bd., 288 Ark. 1, 701 S.W.2d 361 (1986).

Where patient was under a doctor's care while in nursing home, but his death was from leaving unnoticed in a wheelchair and being struck by a car, it was not the result of a "medical injury". Bailey v. Rose Care Ctr., 307 Ark. 14, 817 S.W.2d 412 (1991).

Breach of Warranty.

This section does not apply to actions for medical injury based on breach of express warranty when the issue is whether the medical-care provider guaranteed the results, for to do so would defy common sense and produce absurd results. Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999).

The three requirements of subsection (a), namely the "degree of skill and learning ordinarily possessed and used by members of the profession," failure to "act in accordance with that standard," and "proximate result," typify three requirements of a cause of action sounding in tort: duty, breach, and cause; these three requirements have no relevance in a contract-based cause of action arising out of a guarantee of specific, favorable results, and the standard of care used by medical-care providers in similar communities and situations simply has no relevance in a case where the sole issue is whether a medical-care provider breached this particular express warranty. Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999).

Duty to Disclose Risks.

The physician's duty to disclose risks is measured by the customary practice of physicians in the community in which he practices or in a similar community. Fuller v. Starnes, 268 Ark. 476, 597 S.W.2d 88 (1980).

In a medical malpractice action, the issue of informed consent is foundational to individual claims and cannot be tried on a class basis. Arthur v. Zearley, 320 Ark. 273, 895 S.W.2d 928 (1995).

Doctor's failure to supply to patient that type of information regarding the treatment and surgery as would have been customarily given to a patient in patient's position by other medical providers with similar training and experience at the time of the treatment and surgery in Little Rock or in a similar locality was a proximate cause of patient's damages. Aronson v. Harriman, 321 Ark. 359, 901 S.W.2d 832 (1995).

Evidence.

Trial court erred in granting doctor's motion to dismiss a complaint that alleged sufficient facts to state a claim for medical malpractice where the complaint alleged that (1) the doctor required plaintiff mother, after achieving maximum dilation, to go through over four hours of hard labor before performing a caesarean section, (2) the doctor's failure to timely schedule and perform a caesarean section was a breach of the applicable standard of care, and (3) the child suffered neurological damage and the mother suffered injury to her bladder and associated nerves. Thomas v. Pierce, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 435 (June 16, 2004).

Where the expert witnesses failed to testify regarding the standard of care in the state, the widow failed to establish the requisite standard of care for purposes of this section. Young v. Gastro-Intestinal Ctr., Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 171 (Apr. 28, 2005).

Expert Testimony.

The question of whether to use a Posey vest (a safety restraint) on a patient involved a professional service where only a doctor could authorize its use, although actual placement on the patient was left to the nurse's discretion; accordingly, expert testimony as to the degree of skill used by other hospitals in the locality was required in a suit alleging negligence based on the hospital's failure to use such a vest, and in the absence of such evidence, a directed verdict for the hospital was warranted. Sexton v. St. Paul Fire & Marine Ins. Co., 275 Ark. 361, 631 S.W.2d 270 (1982).

The provisions of this section providing

that a plaintiff must prove that the defendant failed to act in accordance with the degree of skill ordinarily used by doctors in good standing in the local area do not mean that the standing of plaintiff's medical expert is a direct, rather than collateral, issue in a medical malpractice case. Garst v. Cullum, 291 Ark. 512, 726 S.W.2d 271 (1987).

Expert testimony is required when the asserted negligence does not lie within the jury's comprehension, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of expert witnesses to decide the issue of negligence. Prater ex rel. Estate of Prater v. St. Paul Ins. Co., 293 Ark. 547, 739 S.W.2d 676 (1987); Courteau v. Dodd, 299 Ark. 380, 773 S.W.2d 436 (1989); Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 (1996).

In a case involving the diagnosis of appendicitis, expert medical testimony was essential to establish the standard of care required of the diagnosing physician and that the physician failed to act in accordance with that standard. Absent such testimony by a medical expert, plaintiff did not meet his burden of proof and no issue of fact existed for trial. Reagan v. City of Piggott, 305 Ark. 77, 805 S.W.2d 636 (1991).

Testimony of doctor, when given its fullest weight, lacked essential constituent of proof required by subdivision (b)(1), where he made no attempt to compare facilities, practices or advantages in similar localities, but merely asserted that he was familiar with the information which would customarily have been given in order to obtain informed consent. Grice v. Atkinson, 308 Ark. 637, 826 S.W.2d 810 (1992).

Section 16-114-201(3) defines "medical injury" sufficiently broadly; claims based on allegations of a failure to provide needed medical care and attention or the timely diagnosis of medical problems come within the ambit of this subchapter and are dependent upon expert testimony, as outlined in subsection (a). Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 (1995).

Where upon its review of the deposition of plaintiff's expert, the trial court determined that he could not offer expert testimony on the issue of informed consent as required by subsection (b) of this section, the trial court properly concluded that plaintiff had not met her burden of proof and that no material issue of fact existed with respect to informed consent which required presentation of the case to a jury. Brumley v. Naples, 320 Ark. 310, 896 S.W.2d 860 (1995).

Where testifying doctor's opinion was general and based on his experience as an infectious disease expert and did not address a surgical decision by an orthopedist, and where the doctor did not offer testimony that the conduct of the orthopedic surgeons in this case fell below the standard of care for orthopedic surgeons in Little Rock, the defendants met their burden of proving a prima facie case for summary judgment by showing that the plaintiffs had no expert to testify as to the breach of the applicable standard of care. Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 (1996).

Case presented an issue outside the jury's common knowledge that required expert testimony in that physicians made a conscious, medical decision to leave the piece of penrose drain tube in patient's leg, as opposed to the typical foreign object case, which involves the inadvertent leaving of objects in a patient's body, and does not involve a physician's judgment. Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 (1996).

An expert witness need not be one who has practiced in the particular locality, or one who is intimately familiar with the practice in it in order to be qualified as an expert in a medical malpractice action, if an appropriate foundation is established to demonstrate that the witness is familiar with the standard of practice in a similar locality, either by his testimony or by other evidence showing the similarity of localities. First Com. Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996), supp. op., 323 Ark. 406, 917 S.W.2d 167 (1996).

Where a duly licensed and practicing physician has gained knowledge of the standard of care applicable to a specialty in which he is not directly engaged but as to which he has an opinion based on education, experience, observation or association with that specialty, his opinion is competent. First Com. Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996), supp. op., 323 Ark. 406, 917 S.W.2d 167 (1996).

The trial court abused its discretion in excluding the medical expert testimony of

physician where he was able to testify as to the standard of care for a family practitioner and where there was an appropriate foundation established to demonstrate witness's familiarity with the standard of practice in a similar locality. First Com. Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996), supp. op., 323 Ark. 406, 917 S.W.2d 167 (1996).

When the particular issue relates to a question within the general practitioner's own area of expertise, he is not prohibited by the malpractice statute from testifying upon that question as an expert. First Com. Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996), supp. op., 323 Ark. 406, 917 S.W.2d 167 (1996).

Expert testimony is not necessary per se in every medical malpractice case; expert testimony is required only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999).

Plaintiff's argument that subsection (a) is in direct conflict with Evid. Rule 702 was based on a false premise, that subsection (a) mandates the presentation of expert testimony while the rule permits such testimony; however, it is the facts of any given case that determine whether expert testimony is required in a medical malpractice claim for negligence, and accordingly, plaintiff's argument was without merit. Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996), appeal dismissed, 337 Ark. 193, 987 S.W.2d 704 (1999).

When expert testimony is required for proof of a plaintiff's claim for medical malpractice, and the defendant demonstrates the plaintiff's failure to produce the requisite expert testimony, then the defendant has demonstrated that no genuine issues of material fact exist for presentation to a jury and is therefore entitled to summary judgment as a matter of law. Robson v. Tinnin, 322 Ark. 605, 911 S.W.2d 246 (1995).

Exclusion of the deposition testimony of expert witnesses was prejudicial error since this subchapter provides that in any action for medical injury the plaintiff must prove the applicable standard of care, that the medical provider failed to act in accordance with that standard, and that such failure was a proximate cause of the plaintiff's injuries. The plaintiff's burden of proving the applicable standard of care and the defendant's failure to comply with that standard requires expert testimony when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge. National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996).

The violation of the standard of care in a medical malpractice case must be established by expert testimony when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge. Hall v. Arthur, 141 F.3d 844 (8th Cir. 1998).

Where the expert testimony tended to show that a surgeon violated the relevant standard of care, the jury could reasonably conclude that a surgeon assisting him similarly violated the standard of care; additional expert testimony as to the standard of care applicable to an assistant was not required. Hall v. Arthur, 141 F.3d 844 (8th Cir. 1998).

Common knowledge exception did not apply to subsection (b) of this section; therefore, a patient was required to produce expert testimony in order to survive a physician's motion for summary judgment in a medical malpractice case involving the issue of informed consent. Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 (2002).

Trial court properly granted summary judgment for defendant doctors on plaintiff patient's informed consent and medical battery claims where patient failed to provide expert testimony on her informed consent claim, and her battery claim, in turn, was based on her informed consent claim. Parkerson v. Arthur, 83 Ark. App. 240, 125 S.W.3d 825 (2003).

Where decedent's estate alleged that a nursing care facility engaged in medical malpractice and the estate's expert nurse practitioner testified to familiarity with the standard of care for nursing homes, based upon knowledge of federal guidelines and state regulations governing long-term care and knowledge of the policies and procedures of the facility, the testimony did not indicate that the expert's knowledge of the standards of care

for nursing homes was limited to federal and state guidelines; the expert practiced in a nearby town of similar population and affirmatively testified to familiarity with the standard of care in the area where the facility was located. Dooley v. Cap-Care of Ark., Inc., 338 F. Supp. 2d 962 (E.D. Ark. 2004).

Affidavit of estate administrator's expert was not sufficient to overcome the motion for summary judgment where it failed to demonstrate that the expert was knowledgeable by either training or experience as to the standard of care for psychiatric patients. Dodd v. Sparks Reg'l Med. Ctr., — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 203 (Mar. 2, 2005).

Jury Instructions.

The submission of Arkansas Model Jury Instruction 203, in its standard form, correctly instructed the jury as to the burden of proof to be met under any theory of recovery in a medical malpractice action, and it was not error for the trial court to have refused proffered instructions where the model instructions accurately stated the law and where the proposed instructions were potentially misleading. Blankenship v. Burnett, 304 Ark. 469, 803 S.W.2d 539 (1991).

Lay Testimony.

The trial court erred in treating a medical malpractice claim as an ordinary negligence claim, and in permitting the issues raised by the medical malpractice claim to rest on lay testimony. Spring Creek Living Ctr. v. Sarrett, 319 Ark. 259, 890 S.W.2d 598 (1995).

Proximate Cause.

This section implements the traditional tort standard of requiring proof that "but for" the tortfeasor's negligence, the plaintiff's injury or death would not have occurred. Ford v. St. Paul Fire & Marine Ins. Co., 339 Ark. 434, 5 S.W.3d 460 (1999).

Res Ipsa Loquitur.

The doctrine of res ipsa loquitur may apply in cases of medical malpractice on the part of any and all medical care providers as defined by the Medical Malpractice Act if the essential elements for application of the doctrine exist. Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 (1991).

The doctrine of res ipsa loquitur did apply where the defendant was an insurer for a medical center and the operating room, equipment, and nurses involved were all under the control or management of the medical center. Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 (1991).

The doctrine of res ipsa loquitur did not apply to anesthesiologists where the expert witness testified in clear and unequivocal terms that the care and treatment offered by the anesthesiologists was not below the standard of care required. Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 (1991).

The trial court did not err in refusing to give a jury instruction on res ipsa loquitur for a plaintiff who developed a vesicovaginal fistula following her abdominal hysterectomy. Taylor v. Riddell, 320 Ark. 394, 896 S.W.2d 891 (1995).

Standard of Care.

The definition of standard of care found in this section creates an objective standard, and the court improperly instructed the jury on Arkansas law by using a model instruction which added the language "using his best judgment", inserting subjective considerations into the objective standard. Pearce v. Cornerstone Clinic for Women, 938 F.2d 855 (8th Cir. 1991).

An objective standard for determining the effect of complete information on patient's decision is used; this approach permits the jury to take into account patient's testimony with regard to whether he would have consented to risks but will not predicate the outcome of the case solely on that testimony. Aronson v. Harriman, 321 Ark. 359, 901 S.W.2d 832 (1995).

Physicians were entitled to summary judgment as a matter of law in an action for medical malpractice where plaintiffs offered no argument that either physician deviated below the required standard of care. National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996).

To sustain a claim for medical malpractice a plaintiff must prove, among other elements, the applicable standard of care and the defendant's breach thereof. Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 (1996).

Simply because treatment is available for a medical injury, it does not follow that it is negligence for a medical care provider not to provide the treatment. Robson v.

Tinnin, 322 Ark. 605, 911 S.W.2d 246 (1995).

Where decedent refused to follow the directives of a medical center and its nurse not to drive after being sedated for a procedure and he was killed while driving home, the trial court erred in granting summary judgment to the medical center because there was a question created by differing expert opinions as to whether the center's conduct satisfied the required standard of care. Young v. Gastro-Intestinal Ctr., Inc., — Ark. App. —, 167 S.W.3d 180, 2004 Ark. App. LEXIS 477 (2004).

In a case under former § 16-114-205, a widow had not established the requisite standard of care where her expert witnesses, both from Texas, failed to testify regarding the standard of care in Little Rock, Arkansas. Young v. Gastro-Intestinal Ctr., Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 171 (Mar. 24, 2005).

Trial court properly found that a medical center and nurse did not owe a duty to widow's husband, a patient at the center, where the husband left against medical advice and the nurse had no right or legal duty to impose restrictions on the husband; there was no statute imposing a duty on a medical care provider to control a patient and the court refused to do so. Young v. Gastro-Intestinal Ctr., Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 171 (Apr. 28, 2005).

Cited: Carroll-Boone Water Dist. v. M. & P. Equip. Co., 280 Ark. 560, 661 S.W.2d 345 (1983); Cathey v. Williams, 290 Ark. 189, 718 S.W.2d 98 (1986); HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988); Alexander v. Chapman, 299 Ark. 126, 771 S.W.2d 744 (1989); Cash v. Lim, 322 Ark. 359, 908 S.W.2d 655 (1995); Wal-Mart Stores, Inc. v. Tucker, 353 Ark. 730, 120 S.W.3d 61 (2003); Wal-Mart Stores, Inc. v. Kilgore, 85 Ark. App. 231, 148 S.W.3d 754 (2004); Whorton v. Dixon, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 516 (Sept. 29, 2005).

16-114-207. Expert witnesses.

In any action for medical injury:

(1) Rule 702 of the Uniform Rules of Evidence shall govern the qualifications of expert witnesses;

(2) No witness whose compensation for his services is in any way dependent on the outcome of the case shall be permitted to give expert testimony;

(3) No medical care provider shall be required to give expert opinion testimony against himself or herself as to any of the matters set forth in § 16-114-206 at a trial. However, this shall not apply to discovery. Discovery information can be used at a trial as in other lawsuits.

History. Acts 1979, No. 709, § 3; A.S.A. 1947, § 34-2615.

CASE NOTES

Analysis

Constitutionality.
Qualified to testify.
Relevance.
Use of equipment.

Constitutionality.

Where plaintiffs at trial merely made conclusory statements that this section was unconstitutional, argument on the issue was procedurally barred. National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996).

Where patient alleged that this section was violative of the Fourteenth Amendment and Ark. Const. art. 2, § 3, but failed to raise her strict scrutiny argument before the circuit court, the Arkansas Supreme Court applied a rational basis test and determined that the statute was rationally related to the purposes of the legislature in enacting the statute.

Whorton v. Dixon, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 516 (Sept. 29, 2005).

Qualified to Testify.

Whether a witness is qualified to testify as an expert upon a particular question is a matter to be decided within the discretion of the trial court. Cathey v. Williams, 290 Ark. 189, 718 S.W.2d 98 (1986).

If there is a reasonable basis for saying a witness knows more about the subject than a person of ordinary knowledge, his evidence is admissible. Courteau v. Dodd, 299 Ark. 380, 773 S.W.2d 436 (1989).

Relevance.

In medical malpractice action, plaintiffs failed to demonstrate that the trial court abused its discretion in concluding testimony regarding defendant doctor's past experience as a medical expert for a plaintiff's attorney was relevant. National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996).

Use of Equipment.

The question of whether to use a Posey vest (a safety restraint) on a patient involved a professional service where only a doctor could authorize its use, although actual placement on the patient was left to the nurse's discretion; accordingly, expert testimony as to the degree of skill used by other hospitals in the locality was required in a suit alleging negligence based on the hospital's failure to use such a vest, and, in the absence of such evidence, a directed verdict for the hospital was warranted. Sexton v. St. Paul Fire & Marine Ins. Co., 275 Ark. 361, 631 S.W.2d 270 (1982).

Cited: Prater ex rel. Estate of Prater v. St. Paul Ins. Co., 293 Ark. 547, 739 S.W.2d 676 (1987); HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988); Goodwin v. Harrison, 300 Ark. 474, 780 S.W.2d 518 (1989); First Com. Trust Co. v. Rank, 323 Ark. 390, 915 S.W.2d 262 (1996).

16-114-208. Damage awards — Periodic payment of future damages.

(a)(1)(A) The damages awarded may include compensation for actual economic losses recognized by law suffered by the injured person by reason of medical injury, including, but not limited to, the cost of reasonable and necessary medical services, rehabilitation services, custodial care, loss of services, and loss of earnings or earning capacity;

(B) Any evidence of damages for the cost of any necessary medical care, treatment, or services received shall include only those costs actually paid by or on behalf of the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.

(2) The damages awarded may include compensation for pain and suffering and other noneconomic loss recognized by law.

(b) In the event of a verdict for the plaintiff, the finder of fact shall separately state its awards for both past and future economic losses and for both past and future noneconomic losses.

(c)(1) In the event of a judgment for the plaintiff, if the award for future damages exceeds one hundred thousand dollars ($100,000), the court, at the request of either party, shall order that the future damages of the injured person exceeding one hundred thousand dollars ($100,000) be paid, in whole or in part, by periodic payments as determined by the court, rather than by lump sum payment, on such terms and conditions as the court deems just and equitable in order to protect the plaintiff's rights to future payments.

(2) As a condition to authorizing periodic payments of future damages, the court may order a judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages.

(3) In the event of the death of the injured person prior to completion of installment payments of principal and interest upon motion of any party in interest, the court shall modify the order by deducting from the remaining balance the amount representing unpaid compensation for future pain and suffering and future expenses of care and by ordering the remainder to be paid into and become a part of the estate of the decedent.

History. Acts 1979, No. 709, § 7; A.S.A. 1947, § 34-2619; Acts 2003, No. 649, §§ 19, 20.

Amendments. The 2003 amendment redesignated former (a)(1) as present (a)(1)(A); added (a)(1)(B); and, in (c)(1), deleted "may" following "the court," inserted "shall" following "either party," inserted "and conditions" and added "in order to protect the plaintiff's rights to future payments" at the end.

CASE NOTES

Analysis

Purpose.
Construction with other laws.
Evidence.
Punitive damages.

Purpose.

The purpose of this section is not to eliminate wrongful death damages in medical malpractice cases or to delineate the damages allowed in medical malpractice cases, but rather to determine how damages to the injured person would be awarded, to allow for installment payments in certain situations, and to provide for the reduction of damages if the injured person died before all the installment payments were made. Meredith v. Buchman, 101 F. Supp. 2d 764 (W.D. Ark. 2000).

Construction With Other Laws.

By passing this subchapter, the Arkansas General Assembly did not repeal the Wrongful Death Act, § 16-62-102, in cases where the death was caused by a medical injury. Meredith v. Buchman, 101 F. Supp. 2d 764 (W.D. Ark. 2000).

Evidence.

Evidence supported award of damages in wrongful death case resulting from medical negligence. Kelley v. Wiggins, 291 Ark. 280, 724 S.W.2d 443 (1987).

Punitive Damages.

Punitive damages are recoverable in medical malpractice actions. In enacting the Arkansas Medical Malpractice Act, the Arkansas General Assembly did not restrict an injured party for claiming punitive damages when a medical-care provider was guilty of willful and wanton misconduct. HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988).

Cited: HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988).

16-114-209. False and unreasonable pleadings.

(a) If any action for medical injury is filed without reasonable cause, the party or attorney who signed the complaint shall thereafter, as determined by the court, be subject to:

(1) The payment of reasonable costs, including attorney's fees, incurred by the other party by reason of the pleading; and

(2) Appropriate sanctions.

(b)(1) In all cases where expert testimony is required under § 16-114-206, reasonable cause for filing any action for medical injury due to negligence shall be established only by the filing of an affidavit that shall be signed by an expert engaged in the same type of medical care as is each medical care provider defendant.

(2) The affidavit shall be executed under oath and shall state with particularity:

(A) The expert's familiarity with the applicable standard of care in issue;

(B) The expert's qualifications;

(C) The expert's opinion as to how the applicable standard of care has been breached; and

(D) The expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.

(3)(A) The plaintiff shall have thirty (30) days after the complaint is filed with the clerk to file the affidavit before the provisions of subsection (a) of this section apply.

(B) If the affidavit is not filed within thirty (30) days after the complaint is filed with the clerk, the complaint shall be dismissed by the court.

History. Acts 1979, No. 709, § 8; A.S.A. 1947, § 34-2620; Acts 2003, No. 649, § 21.

Amendments. The 2003 amendment rewrote this section.

CASE NOTES

Cited: Haney v. DeSandre, 286 Ark. 258, 692 S.W.2d 214 (1985); HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 745 S.W.2d 120 (1988).

16-114-210. Employed medical care provider.

When a medical care provider is a codefendant with a medical care facility in an action for medical injury, and the only reason for naming the facility as a defendant is that the defendant medical care provider practices in the facility, the plaintiff shall have the burden of proving that the defendant medical care provider is the employee of the facility before the facility may be held liable for the medical care provider's negligence, if any is proven.

History. Acts 2003, No. 649, § 22.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments, 56 Ark. L. Rev. 703 (2003).

16-114-211. Surveys and inspection reports as evidence.

The results of any surveys or inspections by state or federal regulators, or by accrediting organizations, that are not otherwise privileged

and that the plaintiff seeks to use as evidence against a medical care provider must be relevant to the plaintiff's injury to be admissible at trial.

History. Acts 2003, No. 649, § 22.

16-114-212. Tolling of the statute of limitations.

(a) If a plaintiff serves written notice of intention to file an action for medical injury within thirty (30) days prior to the expiration of the applicable statute of limitations, the statute of limitations shall be tolled for ninety (90) days only if the following conditions are met:

(1) The written notice shall be served by certified mail, return receipt requested, upon the medical care provider alleged to have caused the medical injury;

(2) The written notice shall include the following:

(A) The plaintiff's full name, date of birth, present address, address at the time of treatment at issue, and social security number;

(B) The date or dates of the treatment in question and a summary of the alleged wrongful conduct; and

(C) The names and addresses of the known medical care providers relating to the alleged injury; and

(3) An authorization to release medical records signed by the plaintiff, which shall authorize the medical care provider alleged to be liable to obtain pertinent medical records, shall be attached to the notice.

(b) Failure to comply with any of the requirements set forth in subsection (a) of this section shall be deemed to be material and shall result in the statute of limitation's not being tolled.

(c)(1) If the plaintiff files an action for medical injury during this tolling period without the requisite affidavit required by § 16-114-209(b)(1) and (2), the complaint shall be dismissed and costs, attorney's fees, and appropriate sanctions as determined by the court shall be assessed.

(2) The provisions of § 16-114-209(b)(3) do not apply to cases filed during the tolling period.

(d)(1) If a request for the production of copies of the medical records accompanies the written notice of intention to file an action for medical injury in accordance with subsection (a) of this section, and if copies of those medical records are not provided within thirty (30) days of receipt of the notice, then the plaintiff may file an independent expedited declaratory action seeking a declaration that the medical care provider failed to produce the medical records within the thirty-day period.

(2)(A) If the court finds that copies of the medical records were not produced as required by this subsection, the statute of limitations shall be tolled for a period of seventy-five (75) days from the date of the production of the copies of the medical records.

(B) If the court finds that the failure to produce copies of the requested medical records is without good cause, the court shall award the plaintiff his or her reasonable costs and attorney's fees for the declaratory judgment action.

History. Acts 2003, No. 649, § 22.

Subchapter 3 — Accountants and Attorneys

SECTION.
16-114-301. Applicability.
16-114-302. Liability of accountants.
SECTION.
16-114-303. Liability of attorneys.

Effective Dates. Acts 1987, No. 661, § 5: Apr. 6, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the liability of accountants and attorneys to persons not in privity of contract with them should be specifically outlined by legislative enactment; that this Act establishes the limits of such liability; and that this Act should go into effect as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-114-301. Applicability.

This subchapter shall apply only to acts, omissions, decisions, or other conduct in connection with professional services occurring or rendered on or after April 6, 1987.

History. Acts 1987, No. 661, § 3.
Publisher's Notes. This section is also codified as §§ 16-22-310 (last paragraph) and 17-12-701.

RESEARCH REFERENCES

UALR L.J. Survey — Attorneys, 10 UALR L.J. 539.

16-114-302. Liability of accountants.

No person, partnership, or corporation licensed or authorized to practice under the Public Accountancy Act of 1975, § 17-12-101 et seq., or any of its employees, partners, members, officers, or shareholders shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by such person, partnership, or corporation, except for:

(1) Acts, omissions, decisions, or conduct that constitutes fraud or intentional misrepresentations; or

(2) Other acts, omissions, decisions, or conduct if the person, partnership, or corporation was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action. For the purposes of this subdivision (2), if the person, partnership, or corporation:

(A) Identifies in writing to the client those persons who are intended to rely on the services, and

(B) Sends a copy of the writing or similar statement to those persons identified in the writing or statement,

then the person, partnership, or corporation or any of its employees, partners, members, officers, or shareholders may be held liable only to the persons intended to so rely, in addition to those persons in privity of contract with such person, partnership, or corporation.

History. Acts 1987, No. 661, § 1.

Publisher's Notes. This section is also codified as § 17-12-702.

RESEARCH REFERENCES

Ark. L. Rev. Morrison & George, Arkansas's Privity Requirement for Attorney and Accountant Liability, 51 Ark. L. Rev. 697.

UALR L.J. Survey — Attorneys, 10 UALR L.J. 539.

CASE NOTES

Analysis

Benefit to others.
Statute of limitations.

Benefit to Others.

Where accounting firm never identified plaintiff as a person who was intended to rely on the accounting firm's services, nor did plaintiff allege in his complaint that firm sent him a copy of a statement announcing such intent, plaintiff was not in privity of contract, and did not qualify as a third-party beneficiary or fall within subdivision (2). Swink v. Ernst & Young, 322 Ark. 417, 908 S.W.2d 660 (1995).

Statute of Limitations.

The limitations period in professional malpractice cases begins to run when the wrongful acts occur, not when they are discovered. Swink v. Ernst & Young, 322 Ark. 417, 908 S.W.2d 660 (1995).

16-114-303. Liability of attorneys.

No person licensed to practice law in Arkansas and no partnership or corporation of Arkansas licensed attorneys or any of its employees, partners, members, officers, or shareholders shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person, partnership, or corporation, except for:

(1) Acts, omissions, decisions, or conduct that constitutes fraud or intentional misrepresentations; or

(2) Other acts, omissions, decisions, or conduct if the person, partnership, or corporation was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action. For the purposes of this subdivision, if the person, partnership, or corporation:

(A) Identifies in writing to the client those persons who are intended to rely on the services, and

(B) Sends a copy of the writing or similar statement to those persons identified in the writing or statement,

then the person, partnership, or corporation or any of its employees, partners, members, officers, or shareholders may be held liable only to the persons intended to so rely, in addition to those persons in privity of contract with the person, partnership, or corporation.

History. Acts 1987, No. 661, § 2.

Publisher's Notes. This section is also codified as § 16-22-310 (except last paragraph).

RESEARCH REFERENCES

Ark. L. Rev. Morrison & George, Arkansas's Privity Requirement for Attorney and Accountant Liability, 51 Ark. L. Rev. 697.

UALR L.J. Survey — Attorneys, 10 UALR L.J. 539.

Annual Survey of Caselaw, Tort Law, 24 UALR L.J. 1085.

CASE NOTES

ANALYSIS

Employees.
Immunity.

Employees.

Employer attorney was not entitled to the immunity protection of this section or § 16-22-310 for her own negligence in not adequately supervising her employee, another attorney, who was suspected of dishonest conduct in his transaction with clients who were not in privity of contract with the employer attorney, as the employer attorney's negligence was not related to the performance of professional services as required under the statute, but instead involved her supervision of his conduct as his employer. Madden v. Aldrich, 346 Ark. 405, 58 S.W.3d 342 (2001).

Immunity.

Trial court properly concluded that the lawyer placed a lien on land in which he believed the landowner held an interest and that the acts were the lawful actions of an attorney representing his client; therefore, the lawyer was immune under § 16-22-310 and this section from the landowner's slander of title lawsuit. Fleming v. Cox Law Firm, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 408 (June 23, 2005).

CHAPTER 115

MANDAMUS AND PROHIBITION

SECTION.
16-115-101. Definitions.
16-115-102. Jurisdiction.
16-115-103. Precedence of petitions over other actions.
16-115-104. Hearings — Necessity — Time.
16-115-105. Notice of hearing.
16-115-106. Answer.
16-115-107. Determination of petition.
16-115-108. Interlocutory orders.
16-115-109. Appeals by state.

Effective Dates. Acts 1991, No. 582, § 5: Mar. 18, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the requirement of holding a hearing on petitions for writs of prohibition and mandamus within two to seven days of application for the writ does not promote a thorough and fair consideration of the issues in such cases; and that the interests of justice and a fair determination of the issues demand that the courts be permitted to hold the hearings, where necessary, within a reasonable time of application. Therefore, an emergency is hereby declared to exist and this act, being necessary for the preserva-

tion of the public peace, health and safety, shall become effective immediately upon passage."

RESEARCH REFERENCES

ALR. Availability of writ of prohibition or similar remedy against acts of public prosecutor. 16 ALR 4th 112.

Attorneys' fees in mandamus proceedings. 34 ALR 4th 457.

Am. Jur. 52 Am. Jur. 2d, Mand., § 1 et seq.

63C Am. Jur. 2d, Prohib., § 1 et seq.

Ark. L. Rev. Mandamus to Review Administrative Action in Arkansas, 11 Ark. L. Rev. 351.

Judicial Review of Administrative Agencies in Arkansas, 25 Ark. L. Rev. 397.

Gingerich, Mandamus of Unexecuted Executive Discretionary Powers, 33 Ark. L. Rev. 765.

Comment, The Writ of Prohibition in Arkansas, 36 Ark. L. Rev. 256.

C.J.S. 55 C.J.S., Mand., § 1 et seq.

72A C.J.S., Prohib., § 1 et seq.

UALR L.J. Survey of Arkansas Law, Civil Procedure, 1 UALR L.J. 131.

16-115-101. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Writ of mandamus" means an order of the circuit court granted upon the petition of an aggrieved party or the state when the public interest is affected, commanding an executive, judicial, or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law; and

(2) "Writ of prohibition" means an order of the circuit court to an inferior court or tribunal, prohibiting it from proceeding in a cause or matter over which it has no jurisdiction.

History. Acts 1939, No. 54, §§ 2, 3; A.S.A. 1947, §§ 33-102, 33-103; Acts 2003, No. 1185, § 236.

Amendments. The 2003 amendment substituted "circuit court" for "circuit or chancery court" throughout.

Cross References. Supreme Court, writs of mandamus and prohibition, Ark. Const., Art. 7, § 4.

CASE NOTES

Analysis

Mandamus.
Prohibition.

Mandamus.

Mandamus will not lie to control the judicial discretion or judgment of an inferior court or tribunal, but only to compel them to an exercise of their discretion or judgment. Gunn's Adm'r v. Pulaski, 3 Ark. 427 (1841); Ex parte Hutt, 14 Ark. 368 (1854); Ex parte Johnson, 25 Ark. 614 (1869); Ex parte Hays, 26 Ark. 510 (1871); McMillen v. Smith, 26 Ark. 613 (1871); County Court v. Robinson, 27 Ark. 116 (1871); Hempstead County v. Grave, 44 Ark. 317 (1884) (preceding decisions under prior law).

A jurat is necessary to a petition for mandamus. Black v. Auditor of State, 26 Ark. 237 (1870) (decision under prior law).

Where the writ of mandamus is sought for the enforcement of a public right, it is not necessary that the relator should have any special interest; but the proceeding must be in the name of the state. Moses v. Kearney, 31 Ark. 261 (1876) (decision under prior law).

The officer whose conduct is complained

of should alone be made the party defendant in a petition for mandamus. Fry v. Reynolds, 33 Ark. 450 (1878) (decision under prior law).

The writ of mandamus is a writ to compel the performance of an act or duty, and not to prevent it; and the statutes do not intend that it shall take the place of an injunction. Crawford v. Carson, 35 Ark. 565 (1880) (decision under prior law).

Petitioner for the writ of mandamus to require a certain officer to perform some duty must show a valid statute imposing that duty. Hodges v. Dawdy, 104 Ark. 583, 149 S.W. 656 (1912); Hodges v. Keel, 108 Ark. 184, 159 S.W. 21 (1913); Robertson v. Derrick, 113 Ark. 40, 166 S.W. 936 (1914) (preceding decisions under prior law).

Mandamus will not issue unless there is a clear legal right to the writ shown and no other remedy is provided, nor will it issue to compel an officer to do what the law will not compel him to do without it. Coleman v. Eight Mile Drainage Dist. No. 2, 106 Ark. 22, 152 S.W. 1004 (1912) (decision under prior law).

Mandamus is not a writ of right but is within the judicial discretion of courts to issue or withhold, and a party to be entitled to the writ must show that he has a clear legal right to the subject matter and that he has no other adequate remedy. State v. Board of Dirs., 122 Ark. 337, 183 S.W. 747 (1916) (decision under prior law).

Mandamus cannot be used to establish a right, but may be used to enforce a right after it is once established. Bingham v. McGehee, 185 Ark. 707, 49 S.W.2d 358 (1932) (decision under prior law).

When, in the absence of statutory regulation, the proceedings are for the enforcement of a duty affecting not a private right, but a public one common to the whole community, it is not necessary that the relator should have a special interest in the matter or that he should be a public officer. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

Petition in "public interest" was held in substantial compliance with the statutory requirement that mandamus actions be in the name of the state. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

The writ of mandamus cannot be issued to the legislature, even when the duty sought to be compelled is clear and unmistakable. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

Mandamus will not lie to compel the presiding officer of the Senate or the Speaker of the House to perform any act which is within his legislative functions, except for acts which are purely ministerial in character. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

A mandamus action enforces the performance of a legal right after it has been established; a mandamus' purpose is not to establish a right. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

The Department of Human Services (DHS) was not entitled to a writ of mandamus ordering the Claims Commission to dismiss a claim pending before it since the DHS had an adequate remedy of appealing the Claims Commission's ruling to the General Assembly. Hanley v. Arkansas State Claims Comm'n, 333 Ark. 159, 970 S.W.2d 198 (1998).

Judge's discretion to control a docket is not completely obviated by § 16-106-101(c); therefore, state's petition for a writ of mandamus was denied where the state was seeking to remove a mayor from office under Ark. Const. art. 5, § 9 because the trial judge had the discretion to control the docket, and the judge was not required to postpone other cases where the state was not a party in order to accommodate the state. State v. Vittitow, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 402 (June 17, 2004).

Mandamus action was permitted to continue against a trial judge, despite the fact that a circuit court was improperly named as respondent, because the attorney general made an appearance after the petition was properly served on an individual judge. State v. Vittitow, — Ark. —, — S.W.3d —, 2004 Ark. LEXIS 402 (June 17, 2004).

Court properly dismissed student's petition for a writ of mandamus requesting the court to enjoin school officials to reinstate his cancelled test scores in a voluntary reading program after he was accused of cheating; the court knew of no law to compel the school officials to reinstate the student's scores in a voluntary reading program and the student did not sufficiently plead any facts that gave rise to a legal remedy. T.J. v. Hargrove, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 386 (June 16, 2005).

Prohibition.

Prohibition cannot be invoked in a

cause arising out of jurisdiction until the want of jurisdiction has been pleaded and the plea overruled in the court where the proceeding is pending. Ex parte Little Rock, 26 Ark. 52 (1870) (decision under prior law).

The mere filing of the petition for prohibition and notice to the judge will not restrain him from proceeding. Henry v. Steele, 28 Ark. 455 (1873) (decision under prior law).

The writ of prohibition will never be granted unless the inferior court has clearly exceeded its authority and the applicant has no other remedy. Russell v. Jacoway, 33 Ark. 191 (1878); Jones v. Coffin, 96 Ark. 332, 131 S.W. 873 (1910) (preceding decisions under prior law).

A motion to dismiss for want of jurisdiction is a sufficient compliance with the rule that objections must be made in the court to its jurisdiction before a petition for the writ of prohibition will be entertained. State ex rel. Butler v. Williams, 48 Ark. 227, 2 S.W. 843 (1886) (decision under prior law).

Upon a petition to prohibit a circuit judge from proceeding to hear a cause pending in his court, for want of jurisdiction, the Supreme Court will not consider the truth or sufficiency of the allegation of the complaint in the case. American Cas. Ins. Co. v. Lea, 56 Ark. 539, 20 S.W. 416 (1892) (decision under prior law).

Prohibition lies only to a court, and not to a judge. Reese v. Steel, 73 Ark. 66, 83 S.W. 335, 83 S.W. 1136 (1904) (decision under prior law).

A writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising jurisdiction with which it has not been vested by law. Ferguson v. Martineau, 115 Ark. 317, 171 S.W. 472 (1914) (decision under prior law).

Prohibition is not available as a remedy if the statute of limitations governing a particular proceeding is not jurisdictional, but may only be raised as an affirmative defense. Forrest City Mach. Works, Inc. v. Erwin, 304 Ark. 321, 802 S.W.2d 140 (1991).

A writ of prohibition is an extraordinary writ and is granted only when the lower court is wholly without jursdiction, there are no disputed facts, there is no adequate remedy otherwise, and the writ is clearly warranted. Monroe Auto Equip. Co. v. Partlow, 311 Ark. 633, 846 S.W.2d 637 (1993).

Writs of prohibition are prerogative writs, extremely narrow in scope and operation; they are to be used with great caution and forbearance. Monroe Auto Equip. Co. v. Partlow, 311 Ark. 633, 846 S.W.2d 637 (1993).

A characteristic of prohibition is that it does not lie as a matter or right, but as a matter of sound judicial discretion. Monroe Auto Equip. Co. v. Partlow, 311 Ark. 633, 846 S.W.2d 637 (1993).

Prohibition is never granted to prevent an inferior tribunal from exercising its jurisdiction erroneously; it is only granted where such tribunal is wholly without jurisdiction. Monroe Auto Equip. Co. v. Partlow, 311 Ark. 633, 846 S.W.2d 637 (1993).

Cited: Arkansas State Police Comm'n v. Davidson, 252 Ark. 137, 477 S.W.2d 852 (1972); Kemp-Bradford VFW Post 4764 v. Wood, 262 Ark. 168, 554 S.W.2d 344 (1977); Springdale School Dist. v. Jameson, 274 Ark. 78, 621 S.W.2d 860 (1981).

16-115-102. Jurisdiction.

The circuit court shall have power to hear and determine petitions for the writ of mandamus and prohibition and to issue such writs to all inferior courts, tribunals, and officers in their respective jurisdictions.

History. Acts 1939, No. 54, § 1; A.S.A. 1947, § 33-101; Acts 2003, No. 1185, § 236.

Publisher's Notes. It was held in Parker v. Saline County, 288 Ark. 108, 702 S.W.2d 7 (1986), that the part of this section conferring jurisdiction on the chancery court to hear mandamus petitions is unconstitutional.

Amendments. The 2003 amendment substituted "circuit court" for "circuit and chancery court."

Cross References. Restraint of inferior courts, § 16-88-102.

CASE NOTES

Analysis

Constitutionality.
Chancery courts.
County judges.
Election officials.
General assembly.
In vacation.
Justices of peace.
Supreme court.
Writ of prohibition.

Constitutionality.

That part of this section which declares that the chancery court shall have subject matter jurisdiction to hear a petition for a writ of mandamus is unconstitutional. Parker v. Saline County, 288 Ark. 108, 702 S.W.2d 7 (1986).

Chancery Courts.

A mandamus action is not cognizable in equity, and chancery courts have no jurisdiction. Nethercutt v. Pulaski County Special School Dist., 248 Ark. 143, 450 S.W.2d 777 (1970).

County Judges.

A county judge may be compelled by mandamus to perform an act. Parker v. Saline County, 288 Ark. 108, 702 S.W.2d 7 (1986).

Election Officials.

Former statute empowered the circuit court to issue the writ of mandamus to election judges. Brooks v. Pullen, 187 Ark. 80, 58 S.W.2d 682 (1933) (decision under prior law).

Circuit court was held to have jurisdiction to issue mandamus directing county central committee of political party to have names of candidates for township committeemen placed on the ballot. Stock v. Harris, 193 Ark. 114, 97 S.W.2d 920 (1936) (decision under prior law).

The circuit court had no jurisdiction of a proceeding for a writ of mandamus requiring the secretary of a political party's county central committee to turn over all its books, records, and property to "new" committee chairman and secretary where their election was in question and where the members of the "former" committee were not parties to the action. Rosa v. Mabry, 196 Ark. 156, 116 S.W.2d 614 (1938) (decision under prior law).

Former statute gave the circuit court jurisdiction by writ of mandamus over the county central committee for the sole purpose of allowing the minority of a party a right of representation in choosing of judges and clerks for the primary, but the statute did not make county committeemen officers for other purposes; hence their election was a matter solely for determination by the party. Park v. Kincannon, 214 Ark. 398, 216 S.W.2d 376 (1949).

If candidate at preferential primary was entitled to have his name placed on general primary ballot and chairman and secretary of county committee refused to have his name printed thereon, chairman and secretary would be refusing to perform ministerial duty and could be compelled by mandamus to perform it. Higgins v. Barnhill, 218 Ark. 466, 236 S.W.2d 1011 (1951), overruled to such an extent as conflicts, Nethercutt v. Pulaski County Special School Dist., 248 Ark. 143, 450 S.W.2d 777 (1970).

The officers of a county central committee can be compelled by the court to perform the ministerial duty of issuing a certificate of election to the person entitled to it. Cox v. Wentz, 231 Ark. 205, 329 S.W.2d 413 (1959).

The circuit court had jurisdiction to issue a writ of mandamus directing the city clerk to comply with Ark. Const., Amend. 7, by giving certain city residents written notice of the insufficiency of a referendum petition and to permit correction or amendment within 10 days. Bradley v. Galloway, 279 Ark. 231, 651 S.W.2d 445 (1983).

General Assembly.

Where the duty sought to be enforced by a writ of mandamus is imposed upon the Senate and the House and those bodies have refused to do that which is sought to be compelled, neither the president of the Senate nor the Speaker of the House has the power, without the concurrence of the house over which he presides, to execute the order, if made. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

Adjourning and extending a legislative session are clearly among the powers of the General Assembly; once it has exercised its powers, even if they have been exercised erroneously, it is clear that a

circuit court has no power, without violating Ark. Const., Art. 4, § 2 and extending the scope of the writ of mandamus, to issue the writ to that body. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

In Vacation.

The court sitting in vacation, not a judge in vacation, can hear and award the writ. Miller v. Tatum, 170 Ark. 152, 279 S.W. 1002 (1926) (decision under prior law).

Justices of Peace.

When a justice of the peace refused to issue a supersedeas upon the filing of a schedule of exempt property, the proper remedy was by mandamus. Smith v. Ragsdale, 36 Ark. 297 (1880) (decision under prior law).

Supreme Court.

The Supreme Court has power to issue writs of mandamus to the circuit court to compel it to act, but not to control its discretion, where it has any. It may enforce the performance of ministerial acts by the circuit court. McCreary v. Rogers, 35 Ark. 298 (1880) (decision under prior law).

The Supreme Court had no jurisdiction to issue mandamus to clerk of circuit court to compel him to perform a duty required of him by law, although the circuit judge was disqualified to act in the matter. Ex parte Snoddy, 44 Ark. 221 (1884) (decision under prior law).

The Supreme Court had no jurisdiction on a petition for mandamus to require a court stenographer to furnish a transcript of the proceedings; rather, its powers were limited to compelling the clerk of the trial court to send up such record as had been made. Ex parte Whitley, 113 Ark. 372, 168 S.W. 144 (1914) (decision under prior law).

Arkansas Supreme Court dismissed individuals' petition to set the date of an election for the date set out in the referendum petition as it did not have jurisdiction under this section to hear the petition. Spatz v. City of Conway, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 375 (June 9, 2005).

Writ of Prohibition.

The purpose of a writ of prohibition is not to prohibit a lower court from committing error, but to prohibit the unauthorized exercise of jurisdiction when there is no other adequate remedy available by appeal or otherwise. McGlothlin v. Kemp, 314 Ark. 495, 863 S.W.2d 313 (1993).

Cited: Stilley v. Henson, 342 Ark. 346, 28 S.W.3d 274 (2000); Stilley v. Makris, 343 Ark. 673, 38 S.W.3d 889 (2001).

16-115-103. Precedence of petitions over other actions.

Petitions for writs of mandamus or prohibition shall have precedence over all other actions and proceedings and shall be heard and determined summarily.

History. Acts 1939, No. 54, § 4; A.S.A. 1947, § 33-104.

CASE NOTES

Joinder with Other Actions.

A suit for breach of contract and an action for mandamus were so procedurally incompatible as to prevent their joinder; thus a teacher who was not given the required notice that his contract was being terminated had to elect between the common-law action against the school district for money damages or the special proceeding for issuance of a writ of mandamus compelling the school district to issue a voucher for amount of agreed salary. Rastle v. Marion County Rural School Dist. No. 1, 260 Ark. 740, 543 S.W.2d 923 (1976).

Cited: State ex rel. Robinson v. Craighead County Bd. of Election Comm'rs, 300 Ark. 405, 779 S.W.2d 169 (1989).

16-115-104. Hearings — Necessity — Time.

(a) It shall be within the discretion of the judge having jurisdiction, within forty-five (45) days from the date of application, to determine from the petition, and the records and files of the case, whether an evidentiary hearing is warranted.

(b) In the event a hearing is deemed necessary, the judge shall fix and announce a day of court to be held within forty-five (45) days from the date of application.

History. Acts 1939, No. 54, § 6; A.S.A. 1947, § 33-106; Acts 1991, No. 582, § 1.

Cross References. Motion day and hearings on motions, ARCP 78.

Jurisdiction of circuit courts, Ark. Const. Amend. 80, §§ 6, 19.

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Open Meetings Under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268.

UALR L.J. Survey — Civil Procedure, 14 UALR L.J. 747.

CASE NOTES

Analysis

Effect of noncompliance.
Notice.
Request for hearing.

Effect of Noncompliance.

Even if the statutory procedure for mandamus was not precisely followed, that fact will not void a conviction, nor will it shorten the length of time defendant must serve before being eligible for parole. Gilmer v. Massey, 303 Ark. 634, 799 S.W.2d 526 (1990).

Notice.

The minimum two days' notice provided by this section is expressly mandatory. Savage v. Hawkins, 239 Ark. 658, 391 S.W.2d 18 (1965).

Request for Hearing.

Where teacher, whose notice of nonrenewal was late, filed suit for a writ of mandamus to compel members of school board to issue a teaching contract to her for 1982-83 school year, but case did not come to trial until school year had ended, and where teacher had failed to request hearing pursuant to this section, case was moot. Frisby v. Strong School Dist., 282 Ark. 81, 666 S.W.2d 391 (1984).

Cited: Rastle v. Marion County Rural School Dist. No. 1, 260 Ark. 740, 543 S.W.2d 923 (1976); State ex rel. Robinson v. Craighead County Bd. of Election Comm'rs, 300 Ark. 405, 779 S.W.2d 169 (1989); Buttolph Trust v. Jarnagan, 302 Ark. 393, 789 S.W.2d 466 (1990).

16-115-105. Notice of hearing.

(a) Notice of hearing upon any petition for a writ of mandamus or prohibition shall be served in writing upon the officer or persons against whom the relief is sought, for such time and in such manner as may be prescribed by the court having jurisdiction.

(b) The notice shall state the style of the court, the docket number of the action or proceeding, the date and place of hearing, and the relief sought.

(c) The sufficiency of the notice shall be a question for the court.

History. Acts 1939, No. 54, § 5; A.S.A. 1947, § 33-105.

CASE NOTES

Time.

Ten days' notice of an application for a writ of prohibition was not necessary in original proceedings in the Supreme Court. State v. Martineau, 149 Ark. 237, 232 S.W. 609 (1921) (decision under prior law).

Cited: Cox v. Wentz, 231 Ark. 205, 329 S.W.2d 413 (1959).

16-115-106. Answer.

The party against whom the writ of mandamus or prohibition is sought, when properly served with notice, shall file answer before hearing and show cause why the writ should not be granted; otherwise, upon a proper showing, suitable relief shall be speedily granted.

History. Acts 1939, No. 54, § 7; A.S.A. 1947, § 33-107.

CASE NOTES

Analysis

Appeals.
Proper showing.
Show cause.

Appeals.

The issue of an alleged default unmentioned in the trial court cannot be raised on appeal, especially where petitioner made no "proper showing" for relief and where defensive pleadings were timely. Mobley v. Conway County Court, 236 Ark. 163, 365 S.W.2d 122 (1963).

Proper Showing.

Where respondent fails to answer petition, the burden is upon petitioner to make a proper showing that he is entitled to the relief sought. Brown v. Curtis, 254 Ark. 162, 492 S.W.2d 235 (1973).

Show Cause.

A writ of prohibition will not issue until after opportunity is given to parties to show cause against it. Ex parte Tucker, 25 Ark. 567 (1870) (decision under prior law).

16-115-107. Determination of petition.

The court shall hear and determine all questions of law and fact arising on the petition for a writ of mandamus or prohibition. The granting or denying of the writ shall be deemed a final order from which an appeal may be taken.

History. Acts 1939, No. 54, § 8; A.S.A. 1947, § 33-108.

CASE NOTES

Analysis

In general.
Hearing.
Mandamus denied.
Mandamus granted.
Prohibition denied.
Prohibition granted.

In General.

Prohibition is an extraordinary writ and is never issued to prevent a trial court from erroneously exercising its jurisdiction, but only where it proposes to act in

excess of this jurisdiction. Its issuance is discretionary in cases of pressing necessity; it should never be granted unless the petitioner is clearly entitled to relief. Ridenhower v. Erwin, 303 Ark. 647, 799 S.W.2d 535 (1990); Turbyfill v. State, 312 Ark. 1, 846 S.W.2d 646 (1993).

Hearing.

The hearing upon mandamus must be by the court, and not by the judge at chambers. Palmer v. McChesney, 26 Ark. 452 (1871) (decision under prior law).

All questions of law and fact should be submitted together, and decided at the same time. Moses v. Kearney, 31 Ark. 261 (1876) (decision under prior law).

A suit for breach of contract and an action for mandamus were so procedurally incompatible as to prevent their joinder; thus a teacher who was not given the required notice that his contract was being terminated had to elect between the common-law action against the school district for money damages or the special proceeding for issuance of a writ of mandamus compelling the school district to issue a voucher for amount of agreed salary. Rastle v. Marion County Rural School Dist. No. 1, 260 Ark. 740, 543 S.W.2d 923 (1976).

Mandamus Denied.

Mandamus would not lie to compel the Commissioner of State Lands to issue a second patent where the state had wrongfully issued a patent to another; the remedy of the applicant was in equity against the first patentee. Smithee v. Mosely, 31 Ark. 425 (1876) (decision under prior law).

Mandamus will not be granted to compel a public corporation to pay a debt until after the debt is established by judgment. School Dist. No. 3 v. Bodenhamer, 43 Ark. 140 (1884) (decision under prior law).

Mandamus never lies to compel an officer to do an act forbidden or not authorized by law. Chicot County v. Kruse, 47 Ark. 80, 14 S.W. 469 (1885); Fakes v. Stanley, 71 Ark. 30, 70 S.W. 307 (1902) (preceding decisions under former law).

Mandamus will not lie to a board of improvement to compel it to draw its warrant on an empty treasury. Board of Imp. v. McManus, 54 Ark. 446, 15 S.W. 897 (1891) (decision under prior law).

Mandamus would not lie to compel railway to stop trains at incorporated town where no tender of expenses was made as required by statute. Saint Louis, I.M. & S. Ry. v. B'Shears, 59 Ark. 237, 27 S.W. 2 (1894) (decision under prior law).

Mandamus will not lie to control an officer in a discretionary act. Collins v. Hawkins, 77 Ark. 101, 91 S.W. 26 (1905); McBride v. Hon, 82 Ark. 483, 102 S.W. 389 (1907); State ex rel. Nixon v. Grace, 98 Ark. 505, 136 S.W. 670 (1911); Ouachita Power Co. v. Donaghey, 106 Ark. 48, 152 S.W. 1012 (1912) (preceding decisions under prior law).

Where appeal will lie, the petition for mandamus will be denied. Rankin v. Fletcher, 84 Ark. 156, 104 S.W. 933 (1907); Hopson v. Frierson, 106 Ark. 292, 152 S.W. 1008 (1912); Smith v. Carter, 107 Ark. 21, 154 S.W. 951 (1913); Calloway v. Harley, 112 Ark. 558, 166 S.W. 546 (1914) (preceding decisions under prior law).

Mandamus is not allowable where there is any other adequate remedy. Automatic Weighing Co. v. Carter, 95 Ark. 118, 128 S.W. 557 (1910); Cotton v. Steel, 95 Ark. 623, 129 S.W. 1198 (1910); Rolfe v. Spybuck Drainage Dist. No. 1, 101 Ark. 29, 140 S.W. 988 (1911) (preceding decisions under prior law).

Under the rule that an officer of the executive branch of the government cannot be controlled by the courts in the exercise and performance of his official acts involving his judgment and discretion, the auditor would not be compelled by mandamus to audit and pay a claim alleged to be due by the state for the purchase of the state farm unless, by the statute providing for its payment, the auditor was divested of any discretion. Jobe v. Urquhart, 102 Ark. 470, 143 S.W. 121 (1912) (decision under prior law).

Mandamus will not lie to compel the commissioners of an improvement district to allow a set-off for improvements against the assessment. Casey v. Trout, 114 Ark. 359, 170 S.W. 75 (1914) (decision under prior law).

Where lowest bids on a governmental contract were held void under constitutional provision prohibiting interest, court properly refused to order contract awarded to the next lowest bidder, since a petition for mandamus was not the proper remedy. Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co., 234 Ark. 697, 354 S.W.2d 560 (1962).

Where the petitioner failed to show a

clear, certain, specific, or established legal right which could be enforced by writ of mandamus to the presiding officers of the house of the General Assembly, the courts could not interfere with the legislature or the legislative process by issuing such writs. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979).

Petition for writ of mandamus to enforce liability for court costs was denied where the matter was not properly before the Supreme Court since petitioner never attempted to obtain judgment in the trial court. Trice v. City of Pine Bluff, 282 Ark. 251, 667 S.W.2d 952 (1984).

Where sheriff issued a detainer, the fact that there was not a statute that specifically granted the sheriff the authority to issue detainers did not show the specific legal right required for a writ of mandamus to issue. Hicks v. Gravett, 312 Ark. 407, 849 S.W.2d 946 (1993).

Mandamus Granted.

The Supreme Court would, by mandamus, compel the circuit court to permit defendant in a criminal case to take the depositions of witnesses residing out of the state. Gibony v. Rogers, 32 Ark. 462 (1877) (decision under prior law).

Mandamus was the proper remedy to compel the receipt of county warrants for taxes. Fry v. Reynolds, 33 Ark. 450 (1878); Lusk v. Perkins, 48 Ark. 238, 2 S.W. 847 (1886) (preceding decisions under prior law).

The right to an appeal from the judgment of the circuit court is absolute and will be enforced by mandamus. McCreary v. Rogers, 35 Ark. 298 (1880) (decision under prior law).

Mandamus is an appropriate remedy when a public officer is called upon to do a plain and specific public duty positively required by law, calling for the exercise of no discretion or official judgment. Willeford v. State, 43 Ark. 62 (1884) (decision under prior law).

Mandamus will issue whenever the refusal or failure of an officer to act in a matter, in which it is his plain duty to act, may deprive one of his legal rights. Maddox v. Neal, 45 Ark. 121 (1885) (decision under prior law).

School directors may be compelled by mandamus to provide schools in their district. Maddox v. Neal, 45 Ark. 121 (1885) (decision under prior law).

Mandamus will lie to county officers to compel them to pay a judgment in the proper funds collected by them. Lee County v. Phillips County, 46 Ark. 156 (1885) (decision under prior law).

A county judge may be compelled by mandamus to apportion school funds belonging to a school district. Merritt v. Merritt, 54 Ark. 468, 16 S.W. 287 (1891) (decision under prior law).

Mandamus will lie to enforce a decision of the Supreme Court. Nunn v. Robertson, 80 Ark. 350, 97 S.W. 293 (1906) (decision under prior law).

Mandamus will lie in a proper case to require a court to assume jurisdiction. Gilbert v. Shaver, 91 Ark. 231, 120 S.W. 833 (1909) (decision under prior law).

Mandamus will lie to control an officer as to ministerial acts. Jobe v. Caldwell, 93 Ark. 503, 125 S.W. 423 (1910); Jobe v. Urquhart, 102 Ark. 470, 143 S.W. 121 (1912) (preceding decisions under prior law).

Mandamus will lie to compel the issuance of a commission to a notary public. State ex rel. Gray v. Hodges, 107 Ark. 272, 154 S.W. 506 (1913); State ex rel. Mitchell v. Hodges, 107 Ark. 401, 155 S.W. 508 (1913) (preceding decisions under prior law).

Mandamus will lie to enable an elector to inspect the election records. Bowden v. Webb, 116 Ark. 310, 173 S.W. 181 (1915).

Mandamus against an officer in a case where he may exercise discretion will lie only where he refuses to act at all. Miller v. Tatum, 170 Ark. 152, 279 S.W. 1002 (1926) (decision under prior law).

Where circuit court arbitrarily refuses to consider a motion for a new trial, the proper and only remedy is mandamus. Hudlow v. Williams, 196 Ark. 1178, 117 S.W.2d 341 (1938) (decision under prior law).

Prohibition Denied.

Where a cause was improperly remanded to the county court from the circuit court, prohibition would not lie to prevent the county court from assuming jurisdiction, that remedy being available only when the ordinary forms of remedy were insufficient. Thornton v. Allen, 101 Ark. 106, 141 S.W. 499 (1911) (decision under prior law).

Writ of prohibition denied where petitioners did not show that the issuance of

an administrative order, whatever might be said of its propriety or validity, affecting the collection of child support, was an usurpation of jurisdiction by the respondents, or that the issues common to the proceedings were more appropriate to prohibition than to appeal. Monroe Auto Equip. Co. v. Partlow, 311 Ark. 633, 846 S.W.2d 637 (1993).

Generally, a denial of a writ for prohibition is a nonappealable order; however, the appeal from a denial of a writ of prohibition will be treated as a petition for a writ of prohibition filed in the supreme court if it involves an important issue to be resolved. Sexson v. Municipal Court, 312 Ark. 261, 849 S.W.2d 468 (1993).

Prohibition Granted.

When a court is proceeding in a matter not within its jurisdiction, prohibition is the proper remedy. Hanger & Co. v. Keating, 26 Ark. 51 (1870) (decision under prior law).

Where the circuit court attempted to control the discretion of the county court in determining the result of an election for the removal of a county seat, a writ of prohibition would lie from the Supreme Court. Russell v. Jacoway, 33 Ark. 191 (1878) (decision under prior law).

Writ of prohibition was properly issued to prevent trial of defendant after expiration of period of limitation. Savage v. Hawkins, 239 Ark. 658, 391 S.W.2d 18 (1965).

Where a court order is based on invalid legislation, the court has no jurisdiction to act and therefore its order is void and subject to a writ of prohibition. Beaumont v. Adkisson, 267 Ark. 511, 593 S.W.2d 11 (1980).

A writ of prohibition was granted where defendant's right to a speedy trial was violated. Turbyfill v. State, 312 Ark. 1, 846 S.W.2d 646 (1993).

Cited: Venhaus v. Hale, 281 Ark. 390, 663 S.W.2d 930 (1984).

16-115-108. Interlocutory orders.

During the pendency of any proceeding upon a petition for a writ of mandamus or prohibition, the court having jurisdiction, or the judge in vacation, may make such temporary orders as appear expedient and proper to prevent injury, waste, or damage of whatsoever kind.

History. Acts 1939, No. 54, § 9; A.S.A. 1947, § 33-109.

16-115-109. Appeals by state.

Where the interest or rights of the state or the public is affected by a writ of mandamus or prohibition, the prosecuting attorney or Attorney General may appeal without giving security for costs.

History. Acts 1939, No. 54, § 10; A.S.A. 1947, § 33-110.

CHAPTER 116

PRODUCTS LIABILITY

SUBCHAPTER.

1. General Provisions.
2. Firearms and Ammunition.

A.C.R.C. Notes. Due to the addition of Subchapter 2 of this chapter by Acts 2003, No. 935, the preexisting provisions of this chapter have been designated as Subchapter 1.

RESEARCH REFERENCES

ALR. Escalators. 1 ALR 4th 144.

Flammable clothing. 1 ALR 4th 251.

Defect in boat or its parts, supplies, or equipment. 1 ALR 4th 411.

Defective heating equipment. 1 ALR 4th 748.

Prosthesis or other product designed to be surgically implanted in patient's body. 1 ALR 4th 921.

Manufacturer's liability for injuries caused by repairs made under warranty. 2 ALR 4th 576; 40 ALR 4th 1218.

Diethylstilbestrol. 2 ALR 4th 1091.

Snow throwers. 2 ALR 4th 1284.

Defective vehicular windows. 3 ALR 4th 489.

Farm machinery. 4 ALR 4th 13.

Expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous. 4 ALR 4th 651.

Vehicular bumpers. 5 ALR 4th 483.

Personal injury or death allegedly caused by defect in electrical system in motor vehicle. 5 ALR 4th 662.

Clothes dryers. 6 ALR 4th 1262.

Glue and other adhesive products. 7 ALR 4th 155.

Elevators. 7 ALR 4th 852.

Industrial presses. 8 ALR 4th 70.

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused. 9 ALR 4th 494.

Applicability of comparative negligence doctrine to actions based on strict liability in tort. 9 ALR 4th 633.

Workers' Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer. 9 ALR 4th 873.

Liability of builder of residence for latent defects therein as running to subsequent purchasers from original vendee. 10 ALR 4th 385.

Transformers and other electrical equipment. 10 ALR 4th 854.

Ladders. 11 ALR 4th 1118.

Fertilizers, insecticides, pesticides, etc. 12 ALR 4th 462.

Allowances of punitive damages. 13 ALR 4th 52.

Pre-emption of strict liability in tort by provisions of UCC Article 2. 15 ALR 4th 791.

Firearms, ammunition, and chemical weapons. 15 ALR 4th 910.

Tire rims and wheels. 16 ALR 4th 137.

Liability of check printer for errors in identification or routing codes printed on check. 18 ALR 4th 923.

Firefighting equipment. 19 ALR 4th 326.

"Concert of activity" or similar theory as basis for imposing liability upon one or more manufacturers of defective uniform product, in absence of identification of manufacturer of precise unit or batch causing injury. 22 ALR 4th 183.

Mechanical or chain saw or components thereof. 22 ALR 4th 206.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery of product. 30 ALR 5th 1.

Adequacy of warning provided to user of product. 26 ALR 4th 377.

Protective clothing and equipment. 27 ALR 4th 815.

Bystander recovery for emotional distress at witnessing another's injury under strict products liability or breach of warranty. 31 ALR 4th 162.

Strict products liability for failure to warn as dependent on defendant's knowledge of danger. 33 ALR 4th 368.

Stud guns, staple guns, or parts thereof. 33 ALR 4th 1189.

Household appliances: Liability of manufacturer or seller. 34 ALR 4th 95; 35 ALR 4th 663.

Household equipment relating to storage, preparation, cooking, and disposal of food. 35 ALR 4th 663.

Patent or obvious dangers. 35 ALR 4th 861.

Furnishings for home or office. 36 ALR 4th 170.

Bottle explosion or breakage. 36 ALR 4th 419.

Liability of person furnishing, installing, or servicing burglary or fire alarm

system for burglary or fire loss. 37 ALR 4th 47.

Postinjury measures undertaken by defendant. 38 ALR 4th 583.

Manufacturer's responsibility for defective component supplied by another and incorporated in product. 39 ALR 4th 6.

Alteration of product after it leaves hands of manufacturer or seller as affecting liability for product-caused harm. 41 ALR 4th 47.

Construction materials or insulation containing formaldehyde. 45 ALR 4th 751.

Liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew. 45 ALR 4th 777.

Perfumes, colognes, or deodorants. 46 ALR 4th 1197.

Evidence of industry custom or practice. 47 ALR 4th 621.

Am. Jur. 63 Am. Jur. 2d, Prod. Liab., § 1 et seq.

Ark. L. Notes. Copeland, The Implied Warranty of Habitability and the Use of the Uniform Commercial Code by Analogy, 1983 Ark. L. Notes 5.

Smolla, What Types of Losses Are Recoverable Under Arkansas's Products Liability Law, 1984 Ark. L. Notes 11.

Ark. L. Rev. Note, The Arkansas Product Liability Act of 1979, 35 Ark. L. Rev. 364.

Note, Liability of Builder-Vendor: Blagg v. Fred Hunt Co., 35 Ark. L. Rev. 654.

Woods, Some Observations on Contributions and Indemnity, 38 Ark. L. Rev. 44.

C.J.S. 72A C.J.S., Prod. Liab., § 1 et seq.

UALR L.J. Powell, Survey of Torts, 3 UALR L.J. 316.

Arkansas Law Survey, Saunders, Torts, 7 UALR L.J. 259.

Arkansas Law Survey, Roberts and Deere, Torts, 8 UALR L.J. 207.

CASE NOTES

Analysis

In general.
Applicability.
Strict liability.

In General.

The Arkansas Product Liability Act of 1979 was designed to include, and not wipe away, prior precedent. Mulligan v. Lederle Labs., 786 F.2d 859 (8th Cir. 1986).

Applicability.

Although the accident giving rise to the plaintiff's personal injury suit took place two years before enactment of the Product Liability Act of 1979, the act applied to the proceedings in the suit since the act merely sets forth definitions of terms to be used, establishes a limitations period, and enumerates defenses and indemnification remedies available in product liability actions, but creates no new causes of actions, or substantive rights, or liabilities. Despite the general rule that statutes are not to be given retroactive effect unless the legislature has clearly expressed a contrary intention, the Product Liability Act falls within the exception to that rule which is recognized for procedural or remedial legislation that creates no new substantive rights or duties. French v. Grove Mfg. Co., 656 F.2d 295 (8th Cir. 1981).

Neither this chapter, the Arkansas Products Liability Act, nor the Arkansas strict liability statute, § 4-86-102, apply to the commercial leasing of an industrial building because the lease of the building does not qualify as a "product" within the meaning of the Arkansas statutes. McMichael v. United States, 856 F.2d 1026 (8th Cir. 1988).

The product liability remedies found in this chapter are for buyers against manufacturers and suppliers, and for suppliers against manufacturers of defective products and did not apply to plaintiff's tort and contract claims against defendant for dissatisfaction with a horse; the parties did not fit those categories. Mason v. Jackson, 323 Ark. 252, 914 S.W.2d 728 (1996).

Strict Liability.

Strict liability is not absolute liability in Arkansas; a plaintiff in a strict product liability action can also be at fault. Elk Corp. v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987).

Cited: Campbell Soup Co. v. Gates, 319 Ark. 54, 889 S.W.2d 750 (1994).

Subchapter 1 — General Provisions

SECTION.
16-116-101. Title.
16-116-102. Definitions.
16-116-103. Limitation on actions.
16-116-104. Considerations for trier of fact.
16-116-105. Defenses generally.
16-116-106. Evidence of alterations.
16-116-107. Supplier's remedy.

16-116-101. Title.

This subchapter may be cited as the "Arkansas Product Liability Act of 1979".

History. Acts 1979, No. 511, § 1; A.S.A. 1947, § 34-2801.

Publisher's Notes. The term "this chapter" in this section was changed to "this subchapter" in light of the addition of subchapter 2 by Acts 2003, No. 935.

RESEARCH REFERENCES

UALR L.J. Oliver, Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns are not Defective Products, 14 UALR L.J. 1.

Note, Torts — Product Liability — Arkansas Adopts Comment K as an Affirmative Defense in Prescription Drug Actions. 14 UALR L.J. 199.

Survey, Torts, 14 UALR L.J. 417.

CASE NOTES

Cited: E.I. Du Pont de Nemours & Co. v. Dillaha, 280 Ark. 477, 659 S.W.2d 756 (1983); Davis v. DuPont, 729 F. Supp. 652 (E.D. Ark. 1989); West v. Searle & Co., 305 Ark. 33, 806 S.W.2d 608 (1991); West v. G.D. Searle & Co., 317 Ark. 525, 879 S.W.2d 412 (1994).

16-116-102. Definitions.

As used in this subchapter:

(1) "Anticipated life" means the period over which the product may reasonably be expected to be useful to the user as determined by the trier of facts;

(2) "Defective condition" means a condition of a product that renders it unsafe for reasonably foreseeable use and consumption;

(3) "Manufacturer" means the designer, fabricator, producer, compounder, processor, or assembler of any product or its component parts;

(4) "Product" means any tangible object or goods produced;

(5) "Product liability action" includes all actions brought for or on account of personal injury, death, or property damage caused by, or resulting from, the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product;

(6)(A) "Supplier" means any individual or entity engaged in the business of selling a product, whether the sale is for resale, or for use or consumption.

(B) "Supplier" includes a retailer, wholesaler, or distributor and also includes a lessor or bailor engaged in the business of leasing or bailment of a product; and

(7)(A) "Unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses the product, assuming the ordinary knowledge of the community or of similar buyers, users, or consumers as to its characteristics, propensities, risks, dangers, and proper and improper uses, as well as any special knowledge, training, or experience possessed by the particular buyer, user, or consumer or which he or she was required to possess.

(B) However, as to a minor, "unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by an ordinary and reasonably careful minor considering his or her age and intelligence.

History. Acts 1979, No. 511, § 2; A.S.A. 1947, § 34-2802.

Publisher's Notes. The term "this chapter" in this section was changed to "this subchapter" in light of the addition of subchapter 2 by Acts 2003, No. 935.

RESEARCH REFERENCES

Ark. L. Notes. Copeland, A Statutory Primer: Article 2 of the U.C.C., — When Do Its Rules Apply?, 1990 Ark. L. Notes 39.

Looney, The Toothless Cow, the Little Bull That Couldn't, and Udder Matters: Livestock Warranties and the Uniform Commercial Code, 1990 Ark. L. Notes 75.

Ark. L. Rev. Thompson, The Arkansas Products Liability Statute: What Does "Unreasonably Dangerous" Mean in Arkansas?, 50 Ark. L. Rev. 663.

UALR L.J. Note, Torts — Product Liability — Arkansas Adopts Comment K as an Affirmative Defense in Prescription Drug Actions. 14 UALR L.J. 199.

CASE NOTES

Analysis

Applicability.
Defective condition.
Defective design.
Defenses.
Manufacturer.
Product.
Product liability action.
Unreasonably dangerous.

Applicability.

Although the farmers artfully attempted to argue a design-defect case under Ark. Code Ann. § 4-86-102 and this section, a favorable outcome for the farmers would require the chemical company to alter its label for the herbicide; as such, farmer's claims were essentially failure to warn claims and were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C.S. § 136 et seq. Hardin v. BASF Corp., 397 F.3d 1082 (8th Cir. 2005).

Defective Condition.

The definitions in this section of the key terms "defective condition" and "unreasonably dangerous," when applied to the strict liability statute, impose no requirement that a feasible and safer alternative be proven by a plaintiff in a personal injury action, and it is clear that under § 16-116-104 the existence, practicality, and technological feasibility of an alternative safer design are not necessary elements of the plaintiff's cause of action, but rather are merely factors that may be considered by the jury in determining whether a product was supplied in a defective condition that rendered it unreasonably dangerous; accordingly, the trial

court erred in instructing the jury that the plaintiff had the burden of proving that an alternative safer design was available. French v. Grove Mfg. Co., 656 F.2d 295 (8th Cir. 1981).

Defective Design.

The open and obvious danger rule is not an automatic bar to recovery on a strict liability claim in a defective design case. Lockley v. Deere & Co., 933 F.2d 1378 (8th Cir. 1991).

A manufacturer's failure to warn of a danger does not give rise to liability when the dangerous defect is open and obvious, and whether contributory negligence should preclude recovery is generally a question of fact for the jury. Lockley v. Deere & Co., 933 F.2d 1378 (8th Cir. 1991).

District court did not err by refusing to grant tobacco company's motion for judgment as a matter of law because there was sufficient evidence to support the jury's verdict on the claim that its cigarettes had a design defect; the decedant's doctor testified that decedent died from the effects of cigarette smoke, the tobacco company's cigarettes had higher levels of carcinogenic tar than any other brand, and they lacked effective filter technology. Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005).

Defenses.

"Common knowledge" is not a defense to strict liability claims for failure to warn of the health risks of tobacco from 1945 to 1969 because there seems to be no clear consensus among the reported cases as to whether the dangers of cigarette smoking were common knowledge, or if they were, when they became common knowledge. Boerner v. Brown & Williamson Tobacco Co., 126 F. Supp. 2d 1160 (E.D. Ark. 1999).

Manufacturer.

Products liability contemplates that a manufacturer may be responsible for injuries resulting from defective manufacture as well as injuries arising out of erection and assembly of the product. Hergeth, Inc. v. Green, 293 Ark. 119, 733 S.W.2d 409 (1987).

Product.

The supplying of blood for transfusions is a service rather than a product; blood is not a "product" for purposes of imposing strict liability in tort. Kirkendall v. Harbor Ins. Co., 887 F.2d 857 (8th Cir. 1989).

Product Liability Action.

Strict product liability is not extended to include the process by which the shipper secures a product for transportation. Elk Corp. v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987).

Banding of rolls of roofing was not "packaging" for purposes of "product liability action"; the rolls of roofing were the only product, and the act of banding them together was simply part of the loading and transporting process. Elk Corp. v. Jackson, 291 Ark. 448, 727 S.W.2d 856 (1987).

A plaintiff relying solely on a strict products liability theory may bring a claim for punitive damages under Arkansas law. Lockley v. Deere & Co., 933 F.2d 1378 (8th Cir. 1991).

Though majority of courts in the United States hold that a strict liability action cannot be successful if the only damages that occur are to the product itself, Arkansas law endorses the minority view allowing recovery in instances where the only damages are to the defective product itself. Alaskan Oil, Inc. v. Central Flying Serv., Inc., 975 F.2d 553 (8th Cir. 1992).

Retail store chain, as a seller of the product which was the subject of a claim, was "marketing" the product as that term is used in subdivision (5) of this section. Follette v. Wal-Mart Stores, Inc., 41 F.3d 1234 (8th Cir. 1994), supp. op. on reh'g, 47 F.3d 311 (8th Cir. 1995).

In a case involving the group of diet drugs, popularly known as Fen/Phen, citing the factors involved in applying strict liability to a pharmacist's role as supplier in prescription drug transactions, the court declined to extend the rule of strict supplier liability to pharmacists. Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885 (W.D. Ark. 1999).

Unreasonably Dangerous.

The trial court in a personal injury action committed no error in giving a jury instruction requiring the plaintiff to prove that the defendant's crane "contains some danger other than those all cranes pose, which danger was not and would not reasonably be appreciated by an ordinarily prudent person," since that instruction, although not exceedingly clear, was consistent with the Arkansas statutory definition of "unreasonably dangerous" under this section. French v. Grove Mfg. Co., 656 F.2d 295 (8th Cir. 1981).

The fact that irrigation pumps failed to produce the volume of water desired or expected by the buyer raised issues of warranty, negligence, or misrepresentation, but it did not render the pumps "unreasonably dangerous"; they were, at worst, merely useless. Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128 (1983).

The definition of "unreasonably dangerous" indicates the emphasis in the Product Liability Act on determining the product and whether it is defective by its consumer use. The mere fact that under certain circumstances an accident may occur in connection with the use of a product does not make the product unreasonably dangerous for purposes of strict liability. Elk Corp. v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987).

Section 4-86-101, relating to liability for breach of warranty, does not limit strict liability actions to injuries to the ultimate consumer or user; nevertheless, the product has to meet the definition of unreasonably dangerous found in this section. Elk Corp. v. Jackson, 291 Ark. 448, 727 S.W.2d 856 (1987).

Where jury instruction was proffered on the meaning of "unreasonably dangerous" that simply quoted the statutory definition in full, but the court rejected this instruction and gave the jury instead an instruction that tracked only the first sentence of subdivision (7), omitting any reference to the legal definition of unreasonably dangerous as to a minor, it was error to refuse the instruction defining unreasonably dangerous as to a minor. Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64 (8th Cir. 1988).

The degradation of exterior walls was not found to make the house unreasonably dangerous. O'Mara v. Dykema, 328 Ark. 310, 942 S.W.2d 854 (1997).

Cited: Elk Corp. v. Builders Transp., Inc., 862 F.2d 663 (8th Cir. 1988); Kirkendall v. Harbor Ins. Co., 698 F. Supp. 768 (W.D. Ark. 1988); Rogers v. Armstrong World Indus., Inc., 744 F. Supp. 901 (E.D. Ark. 1990); Bushong v. Garman Co., 311 Ark. 228, 843 S.W.2d 807 (1992); Lee v. Martin, 74 Ark. App. 193, 45 S.W.3d 860 (2001); Harrell v. Madison County Miss. Mote Co., 370 F.3d 760 (8th Cir. 2004).

16-116-103. Limitation on actions.

All product liability actions shall be commenced within three (3) years after the date on which the death, injury, or damage complained of occurs.

History. Acts 1979, No. 511, § 3; A.S.A. 1947, § 34-2803.

Cross References. Commencement of new action after nonsuit or judgment arrested or reversed, § 16-56-126.

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Tort Law, 26 UALR L.J. 980.

CASE NOTES

Analysis

In general.
Actions barred.
Actions not barred.
Breach of warranty.
Minors.
Running of statute.

In General.

This section clearly rejects the concept found in some older Arkansas cases that a cause of action accrues when the tort is complete. Mulligan v. Lederle Labs., 786 F.2d 859 (8th Cir. 1986).

Actions Barred.

Where the plaintiff sought to bring a products liability action against the manufacturer of a cardiac pacemaker and the hospital through which the device was sold more than three years after the defective pacemaker was removed and a

substitute pacemaker was inserted, the trial court properly entered a summary judgment for the defendants since the action was barred by the statute of limitations. Spickes v. Medtronic, Inc., 275 Ark. 421, 631 S.W.2d 5 (1982).

An action based on a product implanted by a physician during spinal surgery was barred where the action was not commenced until more than three years after surgery. Martin v. Arthur, 65 Ark. App. 276, 986 S.W.2d 143 (1999).

The Medical Malpractice Act's two-year statute superseded the Products Liability three-year statute of limitations to govern plaintiff's product-liability claims brought against the drug company for medical injury as a result of taking the diet drug popularly known as Fen/Phen. Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885 (W.D. Ark. 1999).

Plaintiff's claim was time-barred because plaintiff became aware of her injury more than three years before she filed her complaint when, although not yet diagnosed with lung cancer, she had trouble breathing, began coughing up blood, was tired all the time, lost her appetite, and experienced constant coughing. Stewart v. Philip Morris, Inc., 205 F.3d 1054 (8th Cir. 2000).

Nurse's product liability complaint brought against drug company for addiction to pain medication was untimely under the three-year statute of limitations in this section; overwhelming proof showed that the nurse was or should have been aware of the drug's harmfulness more than three years before bringing suit in 2000, including, inter alia, that in 1994 and 1995, the nurse's neurologist confronted the nurse about the drug, the nurse deceived other doctors in order to obtain the drug, and the licensing board sent the nurse a hearing notice referring to the drug. Uhiren v. Bristol-Myers Squibb Co., 346 F.3d 824 (8th Cir. 2003).

Actions Not Barred.

The plaintiff's product liability action, which was filed in 1979 against a drug manufacturer, was not barred by the statute of limitations where the plaintiff was injected with the defective drug in 1960, but there was sufficient evidence to conclude either that the true nature of the plaintiff's illness did not manifest itself until 1976 or that it took until 1976 for her to obtain a diagnosis that informed her of the nature and cause of her condition. Mulligan v. Lederle Labs., 786 F.2d 859 (8th Cir. 1986).

Breach of Warranty.

The three-year statute of imitations found in this section, rather than the Uniform Commercial Code general four-year limitation in § 4-2-725, governs a breach-of-warranty suit when damages for personal injury are sought; the Product Liability Act is both more specific and more recent than Arkansas's adoption of the Uniform Commercial Code. Follette v. Wal-Mart Stores, Inc., 41 F.3d 1234 (8th Cir. 1994), supp. op. on reh'g, 47 F.3d 311 (8th Cir. 1995).

Minors.

Section 4-86-102, which governs causes of action based on strict liability, creates a new right that was not available at common law, but does not contain a specific period of limitation; such actions are governed by the general statute of limitations applicable to all products liability cases in this section. Therefore, § 16-56-116 operates to extend the time for minors to file a products liability action brought on a strict liability theory. Harris v. Standardized San. Sys., 658 F. Supp. 438 (W.D. Ark. 1987), rev'd on other grounds, 856 F.2d 64 (8th Cir. 1988).

Running of Statute.

The statute of limitations in a products liability action begins to run when the negligent damage occurs, not from the time the full extent of the injury is ascertained. Spickes v. Medtronic, Inc., 275 Ark. 421, 631 S.W.2d 5 (1982).

The limitations period can begin running if the manifested damage, even if slight, reveals the nature of the injury, and the moment of accrual should be established by reference to a plaintiff's awareness of his condition, including both the fact of the injury and the probable causal connection between the injury and a product's use. Brown v. Dow Chem. Co., 875 F.2d 197 (8th Cir. 1989); Adkison v. G.D. Searle & Co., 971 F.2d 132 (8th Cir. 1992).

The statute of limitations did not begin to run until the date the damage was first detected. Sutterfield v. Holloway Constr. Co., 724 F. Supp. 642 (W.D. Ark. 1989).

The limitations period begins running

when the manifested damage reveals the nature of the injury; in other words, the plaintiff must be aware of the damage and its causes before the time begins to run. Saunders v. Holloway Constr. Co., 724 F. Supp. 640 (W.D. Ark. 1989).

In product liability cases, the statute of limitations does not commence running until the plaintiff knew, or by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered. Martin v. Arthur, 339 Ark. 149, 3 S.W.3d 684 (1999).

Cited: American Gen. Fire & Cas. v. Wal-Mart Stores, Inc., 791 F. Supp. 763 (W.D. Ark. 1992); Adams v. Arthur, 333 Ark. 53, 969 S.W.2d 598 (1998).

16-116-104. Considerations for trier of fact.

(a)(1) In determining the liability of the manufacturer, the state of scientific and technological knowledge available to the manufacturer or supplier at the time the product was placed on the market, rather than at the time of the injury, may be considered as evidence.

(2) Consideration may also be given to the customary designs, methods, standards, and techniques of manufacturing, inspecting, and testing by other manufacturers or sellers of similar products.

(b) The provisions of this section shall not apply to an action based on express warranty or misrepresentation regarding the product.

History. Acts 1979, No. 511, § 5; A.S.A. 1947, § 34-2805.

RESEARCH REFERENCES

UALR L.J. Note, Torts — Product Liability — Arkansas Adopts Comment K as an Affirmative Defense in Prescription Drug Actions. 14 UALR L.J. 199.

CASE NOTES

Analysis

Alternative safer design.
Evidence.
Industry standards.

Alternative Safer Design.

The definitions in § 16-116-102 of the key terms "defective condition" and "unreasonably dangerous," when applied to the strict liability statute, impose no requirement that a feasible and safer alternative be proven by a plaintiff in a personal injury action, and it is clear that under this section, the existence, practicality, and technological feasibility of an alternative safer design are not necessary elements of the plaintiff's cause of action, but rather are merely factors that may be considered by the jury in determining whether a product was supplied in a defective condition that rendered it unreasonably dangerous; accordingly the trial court erred in instructing the jury that the plaintiff had the burden of proving that an alternative safer design was available. French v. Grove Mfg. Co., 656 F.2d 295 (8th Cir. 1981).

Evidence.

Arkansas plaintiffs in strict liability cases are not required to show a difference between the alleged defective product and all other similar products in every case; rather, it is evidence that may be considered by the trier of fact. Buchanna v. Diehl Mach., Inc., 98 F.3d 366 (8th Cir. 1996).

Evidence of the vehicle design change that was made to improve quality, not safety, was properly excluded because it did not tend to prove that the fiberglass liftgate rendered the vehicle defective and was, therefore, irrelevant. Lovett ex rel. Lovett v. Union Pac. R.R., 201 F.3d 1074 (8th Cir. 2000).

Industry Standards.

Evidence of manufacturer's compliance

with applicable industry standards in place at the time of manufacture and evidence that the saw at issue was as safe as other saws manufactured at the time did not prevent a reasonable jury from concluding that the manufacturer was negligent in its design of the saw. Buchanna v. Diehl Mach., Inc., 98 F.3d 366 (8th Cir. 1996).

Cited: Haynes v. AMC, 691 F.2d 1268 (8th Cir. 1982).

16-116-105. Defenses generally.

(a) Compliance by a manufacturer or supplier with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards of design, inspection, testing, manufacture, labeling, warning, or instructions for use of a product shall be considered as evidence that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

(b) Supplying of a product after its anticipated life may be considered as a defense by the manufacturer as between the manufacturer and supplier if the product is supplied after the expiration date placed on the product by the manufacturer as required by law.

(c) Use of a product beyond its anticipated life by a consumer where the consumer knew or should have known the anticipated life of the product may be considered as evidence of fault on the part of the consumer.

History. Acts 1979, No. 511, § 4; A.S.A. 1947, § 34-2804.

RESEARCH REFERENCES

Ark. L. Rev. Note, The Decline of the Learned Intermediary Doctrine in Favor of Direct Patient Warnings of Drug Product Risks, 43 Ark. L. Rev. 828.

CASE NOTES

Industry Standards.

Evidence of manufacture's compliance with applicable industry standards in place at the time of manufacture and evidence that the saw at issue was as safe as other saws manufactured at the time did not prevent a reasonable jury from concluding that the manufacturer was negligent in its design of the saw. Buchanna v. Diehl Mach., Inc., 98 F.3d 366 (8th Cir. 1996).

Cited: Haynes v. AMC, 691 F.2d 1268 (8th Cir. 1982); Elk Corp. v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987).

16-116-106. Evidence of alterations.

If a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or supplier but was made unreasonably dangerous by subsequent unforeseeable alteration, change, improper maintenance, or abnormal use, such conduct may be considered as evidence of fault on the part of the user.

History. Acts 1979, No. 511, § 7; A.S.A. 1947, § 34-2807.

CASE NOTES

Evidence.

The evidence presented by plaintiff in her effort to assign liability to the manufacturer held not substantial enough to negate the existence of other possibilities of sources of contamination. Campbell Soup Co. v. Gates, 319 Ark. 54, 889 S.W.2d 750 (1994).

Cited: Elk Corp. v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987).

16-116-107. Supplier's remedy.

A supplier of a defective product who was not the manufacturer shall have a cause of action for indemnity from the manufacturer of a defective product arising from the supplying of the defective product.

History. Acts 1979, No. 511, § 6; A.S.A. 1947, § 34-2806.

CASE NOTES

Analysis

Applicability.
Operation of law.

Applicability.

Retailer was not entitled to indemnification where the defective product claim failed. Caplener v. Bluebonnet Milling Co., 322 Ark. 751, 911 S.W.2d 586 (1995).

Operation of Law.

Claim could not arise by operation of law where vicarious liability was not present, nor did case involve a defective product. Elk Corp. v. Builders Transp., Inc., 862 F.2d 663 (8th Cir. 1988).

Cited: Martin Farm Enters., Inc. v. Hayes, 320 Ark. 205, 895 S.W.2d 535 (1995).

Subchapter 2 — Firearms and Ammunition

SECTION.
16-116-201. Proximate cause.
16-116-202. Limitations on actions — Award of fees.
16-116-203. Applicability.

16-116-201. Proximate cause.

(a) In a product liability action, the actual discharge of a firearm, a nonpowder gun, or ammunition by a person shall be the proximate cause of injury, damage, or death resulting from the use of the product, and not the inherent capability to cause injury, damage, or death of the firearm, the nonpowder gun, or ammunition.

(b) The manufacturer's, importer's, or distributor's mere placement of a firearm, a nonpowder gun, or ammunition into the stream of commerce shall not be conduct deemed sufficient to constitute the proximate cause of injury, damage, or death resulting from a person's use of the firearm, the nonpowder gun, or ammunition.

(c) Even if the accidental discharge of the firearm or nonpowder gun is found to be foreseeable, the manufacturer's, importer's, or distributor's mere placement of the firearm or nonpowder gun in the stream of commerce shall not be conduct deemed sufficient to constitute proximate cause in a product liability action concerning the accidental discharge of a firearm or nonpowder gun.

History. Acts 2003, No. 935, § 1.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Protection for Dealers in Firearms, 26 UALR L.J. 447.

16-116-202. Limitations on actions — Award of fees.

(a) A person or other public or private entity may not bring an action in tort, other than a product liability action, against a firearms, nonpowder gun, or ammunition manufacturer, importer, or dealer for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm, a nonpowder gun, or ammunition unless the action alleges that the physical or emotional injury, physical damage, or death was caused by the intentional or negligent discharge of a firearm, a nonpowder gun, or ammunition by the manufacturer, importer, or dealer.

(b) A firearm, a nonpowder gun, or ammunition manufacturer, importer, or dealer shall not be held liable as a third party for the actions of another person involving the use of a firearm, a nonpowder gun, or ammunition in any cause of action.

(c)(1) The court, upon the filing of a proper motion, shall dismiss any action brought against a firearms, nonpowder gun, or ammunition manufacturer, importer, or dealer, which the court determines is prohibited under subsection (a) or subsection (b) of this section.

(2) Upon dismissal under this subsection, the court shall award reasonable attorney's fees, in addition to costs, to each named defendant against whom the cause of action is dismissed.

(d)(1) Notwithstanding subsection (a) of this section, a firearms, nonpowder gun, or ammunition manufacturer, importer, or dealer may be sued in tort for any damages proximately caused by an act of the manufacturer, importer, or dealer in violation of a state or federal law or regulation.

(2) In any action brought under this subsection, the plaintiff shall have the burden of proving by a preponderance of the evidence that the defendant violated the state or federal law or regulation.

History. Acts 2003, No. 935, § 2.

16-116-203. Applicability.

Nothing contained in this subchapter shall bar recovery by a plaintiff in a cause of action in which the plaintiff proves that the proximate cause of the injury, damage, or death was:

(1) A defective firearm, a defective nonpowder gun, or defective ammunition that caused the firearm, nonpowder gun, or ammunition to be at variance with its design; or

(2) A defectively designed firearm, a defectively designed nonpowder gun, or defectively designed ammunition that did not function in the

manner reasonably expected by the ordinary consumer of the firearm, nonpowder gun, or ammunition.

History. Acts 2003, No. 935, § 3.

CHAPTER 117
RECEIVERSHIP

SUBCHAPTER.
1. General Provisions.
2. Appointment and Powers of Receiver Generally.
3. Petition by Insolvent Debtor.
4. Assignments for Benefit of Creditors.

RESEARCH REFERENCES

Am. Jur. 65 Am. Jur. 2d, Receiv., § 1 et seq.

C.J.S. 75 C.J.S., Receiv., § 1 et seq.

Subchapter 1 — General Provisions

[Reserved]

Subchapter 2 — Appointment and Powers of Receiver Generally

SECTION.
16-117-201, 16-117-202. [Superseded.]
16-117-203. Actions by receivers — Employment of attorneys.
16-117-204. [Superseded.]
16-117-205. Appointment for corporation, copartnership, or joint-stock company — Powers and duties.
16-117-206. Cases between individuals.
16-117-207. Receivers pendente lite generally.
16-117-208. Receiver to preserve mortgaged property.
16-117-209. Reports and accounts.
16-117-210. Removal.

Cross References. Receivers, ARCP 66.

Surety companies, authority, § 23-63-1001 et seq.

Effective Dates. Acts 1857, § 13, p. 164: effective on passage.

Acts 1931, No. 253, § 4: approved Mar. 31, 1931. Emergency clause provided: "Whereas an agricultural and economic crisis now exists in this State in that the great majority of farmers are unable to obtain money or supplies for the purpose of making crops from sources other than agricultural credit corporations, and said agricultural credit corporations are required by the Federal Intermediate Credit Banks with which they transact business to accompany the application for loans with written assurances from the holders of mortgages on farm lands of Arkansas that the possession of the party or parties will not be disturbed during the existence of said loan if made, and since the great bulk of the agricultural lands of this State are encumbered by mortgages and the holders of said mortgages are widely and diversely distributed through the United States and its territorial limits and for-

eign countries, thereby making it practically impossible to secure said written assurance of non-disturbance of possession in time to plant and cultivate crops during that year, and there therefore being great and immediate danger of the great bulk of the agricultural lands of Arkansas lying idle during the ensuing year, an emergency is therefore and hereby declared to exist and this act shall therefore be in force and effect from and after the date of its passage."

RESEARCH REFERENCES

ALR. Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR 4th 224.

16-117-201, 16-117-202. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that these sections, concerning appointment and powers of receivers, were deemed superseded by the Arkansas Rules of Civil Procedure. The sections derived from the following sources:

16-117-201. Acts 1857, §§ 1-3, p. 164; C. & M. Dig., §§ 8600-8602; Pope's Dig., §§ 11178-11180; A.S.A. 1947, §§ 36-101 — 36-103.

16-117-202. Acts 1857, § 4, p. 164; C. & M. Dig., § 8603; Pope's Dig., § 11181; A.S.A. 1947, § 36-104.

16-117-203. Actions by receivers — Employment of attorneys.

In all cases where it is necessary or proper for a receiver to collect debts by suit, he or she may sue in his or her own name, but all moneys collected by the receiver shall be accounted for and paid into court or be subject to the order of the court. The receiver shall have power to employ attorneys and make to them a reasonable allowance for services. The attorneys shall be paid out of the funds collected by the receiver.

History. Acts 1857, § 5, p. 164; C. & M. Dig., § 8604; Pope's Dig., § 11182; A.S.A. 1947, § 36-105.

CASE NOTES

Analysis

Authority to sue.
Legal representation for receivers.

Authority to Sue.

Where a receiver is appointed by the court to collect certain notes, until he is discharged, he alone is qualified to bring suit to enforce their collection. Driver v. Lanier, 66 Ark. 126, 49 S.W. 816 (1899).

Legal Representation for Receivers.

Where drainage district bondholders and their trustee appealed from decree in their chancery court suit against district's receiver and certain of district's landowners for instructions to receiver, and latter was named as one of appellees on appeal, it was proper for chancery court, on petition of receiver, to direct him to have attorneys, who represented him in chancery court, represent him in Supreme Court. Greer v. Blocker, 218 Ark. 249, 236 S.W.2d 77 (1951).

16-117-204. [Superseded.]

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that this section, concerning actions by receivers, was deemed superseded by the Arkansas Rules of Civil Procedure. The section was derived from Acts 1857, § 6, p. 164; C. & M. Dig., § 8605; Pope's Dig., § 11183; A.S.A 1947, § 36-106.

16-117-205. Appointment for corporation, copartnership, or joint-stock company — Powers and duties.

(a) Whenever, in any case, a receiver is appointed for a corporation or its trustees, any copartnership, or joint-stock company, and the order or decree of the court is that the lands, tenements, goods, chattels, funds, assets, moneys, credits, choses in action, rights and interests of every kind, name, and nature, either in law or equity, or any part thereof, belonging to the corporation or its trustees, a copartnership or joint-stock company, be placed in the hands of the receiver, from thenceforward until the further order or decree of the court, the receiver shall have full possession, custody, and control thereof, and shall be vested with the title, so far as it shall be necessary to collect debts, preserve the assets and property for the benefit of creditors, and all persons interested. The receiver may, and shall, bring and prosecute and defend all suits in his or her own name that may be necessary for that purpose.

(b) In all suits which may be pending in any court, prosecuted by or brought against such corporation, trustees, copartnership, or joint-stock company or in which either may be interested, the receiver may be substituted as a party, on his or her own application, without process or revivor. He or she shall prosecute or defend the suit with the same effect as the original parties might or could do, and suits may progress against him or her by substitution in the same manner.

History. Acts 1857, §§ 7, 8, p. 164; C. & M. Dig., §§ 8606, 8607; Pope's Dig., §§ 11184, 11185; A.S.A. 1947, §§ 36-107, 36-108.

A.C.R.C. Notes. The Supreme Court of Arkansas stated in a Per Curiam of Nov. 24, 1986, that subsection (b) of this section was deemed superseded by the Arkansas Rules of Civil Procedure.

CASE NOTES

Analysis

Debts.
Dividends.

Debts.

Payment to a former officer of a corporation of a debt due the corporation will not extinguish the debt if made after the appointment and qualification of a receiver, and the debtor may not defend that he had no notice of the appointment. Buchanan v. Hicks, 98 Ark. 370, 136 S.W. 177 (1911).

Dividends.

Receiver may recover dividends paid to stockholders of an insolvent corporation. Corn v. Skillern, 75 Ark. 148, 87 S.W. 142 (1905).

16-117-206. Cases between individuals.

The provisions of §§ 16-117-204 and 16-117-205 shall apply to cases between individuals, with like effect, as declared in these sections.

History. Acts 1857, § 9, p. 164; C. & M. Dig., § 8608; Pope's Dig., § 11186; A.S.A. 1947, § 36-109.

16-117-207. Receivers pendente lite generally.

(a) In an action by a vendor to vacate a fraudulent purchase of property, by a creditor to subject any property or fund to his or her claim, or between partners or others jointly owning or interested in any property or fund, on the application of plaintiff or of any party whose right to or interest in the property or fund or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured, the court may appoint a receiver to take charge thereof during the pendency of the action, and may order and coerce the delivery of the property to him or her.

(b) No party or attorney, or person interested in an action, shall be appointed receiver therein.

(c) Before entering upon his or her duties, the receiver must be sworn to perform them faithfully. With one (1) or more sureties approved by the court, he or she shall execute a bond to the person and in such sum as the court shall direct, to the effect that he or she will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

(d) The receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally do such acts respecting the property as the court may authorize.

History. Civil Code, §§ 323, 325-327; C. & M. Dig., §§ 8611, 8613-8615; Pope's Dig., §§ 11189, 11191-11193; A.S.A. 1947, §§ 36-112, 36-114 — 36-116.

RESEARCH REFERENCES

UALR L.J. Arkansas Law Survey, Templeton, Miscellaneous, 9 UALR L.J. 189.

CASE NOTES

ANALYSIS

Appointment.
Duties.
Intervention.
Powers.

Appointment.

Subsection (b) is only declaratory of what the law was before the statute, but it emphasizes the requirement that the receiver must be and remain a disinterested and impartial agent of the courts and parties to the litigation. Cook v. Martin, 75 Ark. 40, 87 S.W. 625 (1905).

The court has power to appoint a receiver where an action is brought between partners or others jointly owning or interested in any property or fund when it is shown that the property or fund is in danger of being lost, removed, or materi-

ally injured. Ford v. Moore, 212 Ark. 248, 205 S.W.2d 209 (1947).

The chancery court had jurisdiction to appoint a receiver upon the application of a creditor to subject any property or fund to his claim under the provisions of the former bulk sales law. Bornsteine v. William R. Moore Dry Goods Co., 226 Ark. 746, 294 S.W.2d 52 (1956).

In a suit to determine the true ownership of the leasehold interest in lands apparently containing oil and gas, the chancellor could appoint a receiver pendente lite and authorize him to contract for the drilling of an oil well upon the property, to keep it from being drained by an existing well upon neighboring property. Davis v. Johnston, 251 Ark. 1078, 479 S.W.2d 525 (1972).

This section providing for the appointment of a receiver is not mandatory, but leaves it to the sound discretion of the court. Phillips v. Tires, Tubes, Wheels, Inc., 274 Ark. 326, 625 S.W.2d 449 (1981).

The trial court is not required to resolve all issues and affirmative defenses going to the merits of an alleged bulk transfer law violation before appointing a receiver pursuant to this section. Phillips v. Tires, Tubes, Wheels, Inc., 274 Ark. 326, 625 S.W.2d 449 (1981).

Duties.

A receiver is a fiduciary representing the court and all parties in interest. First Nat'l Bank v. Quality Chem. Corp., 36 Ark. App. 215, 821 S.W.2d 53 (1991).

Where a duly appointed receiver also had rights as a secured creditor, it was not allowed to personally benefit from its position as receiver to the detriment of other creditors by using that which had been delivered to debtor, without payment. First Nat'l Bank v. Quality Chem. Corp., 36 Ark. App. 215, 821 S.W.2d 53 (1991).

Intervention.

Where bank had itself appointed receiver even though it had an interest in the matter (an appointment which was in apparent violation of this section), basic fairness dictated that petitioner, also claiming an interest, be allowed to intervene and contest the appointment of bank as receiver. Pearson v. First Nat'l Bank, 325 Ark. 127, 924 S.W.2d 460 (1996).

Powers.

The rule that a receiver appointed by one court is not suable in another court does not apply where a receiver is appointed in one of the circuit courts of a county having two judicial districts and is sued in the other circuit court of the county presided over by the same judge who appointed the receiver. Ratcliff v. Adler, 71 Ark. 269, 72 S.W. 896 (1903).

Where drainage district bondholders and their trustee appealed from decree in their chancery court suit against district's receiver and certain of district's landowners for instructions to receiver, and latter was named as one of appellees on appeal, it was proper for chancery court, on petition of receiver, to direct him to have attorneys, who represented him in chancery court, represent him in Supreme Court. Greer v. Blocker, 218 Ark. 249, 236 S.W.2d 77 (1951).

Cited: Chapin v. Stuckey, 286 Ark. 359, 692 S.W.2d 609 (1985).

16-117-208. Receiver to preserve mortgaged property.

In an action by a mortgagee for the foreclosure of his mortgage, and the sale of the mortgaged property, a receiver may be appointed where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage have not been performed and that the property is probably insufficient to discharge the mortgage debt. However, no receiver shall be appointed at the instance of the holder of the mortgage where it appears that the debtor or mortgagor has mortgaged his or her crops, or his or her interest therein, for the purpose of obtaining money or supplies for the making of the crop or waived his or her rents for that purpose, and that the mortgage debt or the consideration for the waiver of rents has not been repaid.

History. Acts 1931, No. 253, § 1; Pope's Dig., §§ 9469, 11190, A.S.A. 1947, § 36-113.

CASE NOTES

Analysis

Appointment of receivers.
Creditors.
Crops.
Enforcement of orders.
Rents.

Appointment of Receivers.

While notice of appointment of receiver is desirable, it is not a prerequisite. Deming Inv. Co. v. Bank of Judsonia, 170 Ark. 65, 278 S.W. 634 (1926) (decision under prior law).

The chancery court in which a suit to foreclose a chattel mortgage was properly brought had jurisdiction to appoint a receiver to take charge of the mortgaged property as an incident to its jurisdiction. Beeson v. Chambers, 192 Ark. 265, 90 S.W.2d 770 (1936).

This section is not mandatory, but leaves in the sound discretion of the court the power to appoint a receiver; and where there is no evidence in the record showing that the court abused its discretion, its action will not be disturbed. Federal Land Bank v. Duffey, 193 Ark. 126, 97 S.W.2d 908 (1936).

Creditors.

A creditor is not barred from participating in the distribution by the receiver of the debtor's assets because his claim is secured by a mortgage on other property. Taylor v. Moore, 64 Ark. 23, 40 S.W. 258 (1897) (decision under prior law).

Where a creditor holding a mortgage on a sawmill consented to the appointment of a receiver thereof and to the operation of the mill by the receiver, such debts as were incurred by the receiver in the operation of the mill would take precedence over the mortgage debt. Buster v. Mann, 69 Ark. 23, 62 S.W. 588 (1900) (decision under prior law).

Crops.

Where a mortgagee of land brought suit to foreclose his mortgage and procure the appointment of a receiver to take charge of the land, this action had the effect of impounding the unsevered crops then growing on the land. Bank of Weiner v. Jonesboro Trust Co., 168 Ark. 859, 271 S.W. 952 (1925) (decision under prior law).

Enforcement of Orders.

Where a mortgagor refuses to attorn or give up possession, the receiver taking possession of the land in a foreclosure proceeding must apply to the court to have his orders enforced in a summary way, and where he fails to do so, he cannot enforce a landlord's attachment. Van Pelt v. Russell, 134 Ark. 236, 203 S.W. 267 (1918) (decision under prior law).

Rents.

Assignee of rents could hold rents as against receiver appointed on petition of mortgagee. Purvis v. Elder, 175 Ark. 780, 1 S.W.2d 36 (1927) (decision under prior law).

The tenant of mortgaged premises upon which the rent was not yet due at the time of the foreclosure sale and for which no receiver was appointed did not thereafter owe rent to the landlord whose interest in the land was foreclosed and his purchase of the land at the foreclosure sale had the effect of extinguishing the rents. Wilson v. Campbell, 244 Ark. 451, 425 S.W.2d 518 (1968).

16-117-209. Reports and accounts.

(a)(1) Receivers shall make report of their proceedings every six (6) months, or more often if required by the court.

(2) The performance of this duty may be enforced by attachment, sequestration, or other proper and effectual means.

(b) Receivers shall have credit for all taxes, expenses, attorney's fees, and necessary disbursements, in the execution of their trusts, and such reasonable and proper compensation for their own services as the court

may allow, to be paid out of the trust fund as part of the costs and expenses.

(c)(1) The court shall pass on their accounts.

(2) A confirmation of the accounts shall be conclusive against all persons whatsoever and not subject to be reinvestigated, except for actual fraud.

History. Acts 1857, § 11, p. 164; C. & M. Dig., § 8610; Pope's Dig., § 11188; A.S.A. 1947, § 36-111; Acts 2003, No. 1185, § 237.

Amendments. The 2003 amendment deleted "judge, or chancellor" following "the court" throughout.

16-117-210. Removal.

Receivers and others appointed who are subject to the provisions of §§ 16-117-203, 16-117-205, 16-117-206, 16-117-209, and 16-117-210 may be removed at any time by the court when it satisfactorily appears that they have failed to discharge any duty incumbent on them or for other sufficient cause. This may be done upon the motion of any person interested either as party, creditor, or otherwise.

History. Acts 1857, § 10, p. 164; C. & M. Dig., § 8609; Pope's Dig., § 11187; A.S.A. 1947, § 36-110; Acts 2003, No. 1185, § 237.

Amendments. The 2003 amendment substituted "§§ 16-117-203, 16-117-205, 16-117-206, 16-117-209, and 16-117-210" for "§§ 16-117-201 — 16-117-206" and deleted "judge, or chancellorship" following "court."

CASE NOTES

Cited: Riner v. Ramey-Milburn Co., 166 Ark. 221, 265 S.W. 963 (1924).

Subchapter 3 — Petition by Insolvent Debtor

SECTION.

16-117-301. Complaint to be declared insolvent — Appointment of receiver.

16-117-302. Delivery of property — Selection of exempt property.

16-117-303. List of creditors furnished — Notice.

16-117-304. Attachments — Intervention by receiver — Dismissal and return of property.

16-117-305. Receiver to convert property into money.

16-117-306. Distribution of funds.

16-117-307. Insolvent partnerships.

Publisher's Notes. As to effect of federal bankruptcy laws in this subchapter, see Friedman & Sons Cloak Co. v. Hogins, 175 Ark. 599, 299 S.W. 997 (1927).

Effective Dates. Acts 1897 (Ex. Sess.), No. 48, § 10: effective on passage.

CASE NOTES

Analysis

Assignments for benefit of creditors.
Authority of state.
Federal jurisdiction.

Assignments for Benefit of Creditors.

Section 16-117-401 et seq., relating to assignments for the benefits of creditors, was not repealed by this subchapter. Finch v. Watson Inv. Co., 184 Ark. 312, 42 S.W.2d 214 (1931).

Authority of State.

A state is without power to make or enforce any law governing bankruptcies that impairs the obligation of contracts, or extends to persons or property outside the jurisdiction, or conflicts with the federal bankruptcy law. International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S. Ct. 108, 73 L. Ed. 318 (1929).

Federal Jurisdiction.

This subchapter is binding on creditors until the jurisdiction in bankruptcy of federal courts is properly invoked. Friedman & Sons Cloak Co. v. Hogins, 175 Ark. 599, 299 S.W. 997 (1927).

State laws governing the distribution of property of insolvents for the payment of their debts and providing for their discharge were superseded by the federal bankruptcy act. International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S. Ct. 108, 73 L. Ed. 318 (1929).

16-117-301. Complaint to be declared insolvent — Appointment of receiver.

Any insolvent debtor may file in the circuit court of the county in which he or she resides a complaint in which one (1) or more of his or her creditors shall be made defendants, asking to be declared an insolvent, and asking for the appointment of a receiver to take charge of his or her property and distribute the property among his or her creditors. Upon the filing of the petition, the court shall appoint a receiver.

History. Acts 1897 (Ex. Sess.) No. 48, § 1, p. 115; C. & M. Dig., § 5885; Pope's Dig., § 7607; A.S.A. 1947, § 36-201; Acts 2003, No. 1185, § 238.

Amendments. The 2003 amendment, in the first sentence, substituted "circuit court" for "chancery court" and in the second sentence, substituted "court" for "chancery court, or judge thereof in vacation" and made gender neutral changes throughout.

CASE NOTES

Ancillary Receivers.

Where receiver is appointed in foreign state and ancillary receiver is then appointed in this state, the time within which ancillary receiver must move to discharge liens runs from his own, and not the principal receiver's appointment, the original and ancillary receivers being treated as different legal persons. Hill v. Caldarera, 197 Ark. 659, 124 S.W.2d 825 (1939).

16-117-302. Delivery of property — Selection of exempt property.

(a) When the receiver has been qualified, the debtor shall turn over to the receiver all of his or her property. For the real estate he or she

shall execute, acknowledge, and deliver to the receiver a proper deed of conveyance.

(b) The debtor shall be allowed by the court to select and reserve whatever property may be allowed to him or her by law as exempt from execution.

History. Acts 1897 (Ex. Sess.), No. 48, § 1, p. 115; C. & M. Dig., § 5885; Pope's Dig., § 7607; A.S.A. 1947, § 36-201.

CASE NOTES

Conflict of Law.

Where citizens of a state who are creditors of a nonresident or a foreign corporation have instituted proceedings in attachment and have acquired liens upon property in the state of their residence, receivers appointed in the domiciliary state will not be allowed to deprive such creditors of their rights, and the courts will protect the lien acquired by their citizens in preference to claims asserted by foreign receiver. Hill v. Caldarera, 197 Ark. 659, 124 S.W.2d 825 (1939).

16-117-303. List of creditors furnished — Notice.

The debtor shall furnish the names and addresses of his or her creditors, who shall be notified by mail and also by order of publication of the filing of the complaint.

History. Acts 1897 (Ex. Sess.), No. 48, § 3, p. 115; C. & M. Dig., § 5887; Pope's Dig., § 7609; A.S.A. 1947, § 36-203.

16-117-304. Attachments — Intervention by receiver — Dismissal and return of property.

The receiver shall intervene in every case in which the property of the insolvent debtor has, within ten (10) days before the filing of the petition, been attached. Upon the receiver's motion, every such attachment shall be dissolved and the attached property shall be turned over to the receiver upon the payment by the receiver of all costs which have accrued in the attachment suit.

History. Acts 1897 (Ex. Sess.), No. 48, § 2, p. 115; C. & M. Dig., § 5886; Pope's Dig., § 7608; A.S.A. 1947, § 36-202.

CASE NOTES

Applicability.

This section does not apply to seizures of property under execution and does not require the receiver to intervene therein. J.M. McGuire & Co. v. Barnhill, 89 Ark. 209, 115 S.W. 1144 (1909).

16-117-305. Receiver to convert property into money.

As soon as the receiver shall have taken the property into his or her custody, he or she shall proceed under the direction of the court, or of the judge, in vacation, to convert the property into money.

History. Acts 1897 (Ex. Sess.), No. 48, § 4, p. 115; C. & M. Dig., § 5888; Pope's Dig., § 7610; A.S.A. 1947, § 36-204.

16-117-306. Distribution of funds.

(a) Upon the final hearing, the court, after deducting the cost and paying all public taxes, shall order the proceeds to be distributed among the creditors in the order and with the following preferences:

(1) The salaries of employees earned within three (3) months and all laborers' wages shall be paid first.

(2) After making the payments provided for in subdivision (a)(1) of this section, the funds in hand shall be applied pro rata towards the payment of the claims of all creditors who shall, before the making of the order of distribution, file in the court a stipulation for the use of the debtor to the effect that in consideration of the preference to be thus obtained, the debtor shall be acquitted of all further liability in personam to such creditor.

(3) After making the payments provided for in subdivision (a)(2) of this section, the remainder of the funds, if any, shall be paid and distributed equally among the other creditors.

(b) If the action or proceeding is commenced within twelve (12) months from the filing of the stipulation provided for in subdivision (a)(2) of this section, the stipulation shall not be held or construed to affect or impair the right of the creditor to collect the remainder of his or her claim, if any, from any other person who is bound to him or her therefor, or to enforce any other security he or she may have for his or her claim, nor shall the stipulation be held to constitute a bar to any action brought or proceeding taken against the debtor for the balance of his or her debt, if the creditor proves that the debtor was guilty of fraud in obtaining the stipulation either by withholding his or her property from the receiver or otherwise.

(c) Any creditor having a lien upon any of the debtor's property for his or her claim shall be required to make a proper deduction for the value of his or her security before participating in the distribution of the general assets of the debtor.

(d) Except as to the creditors of the first class, as enumerated in subsection (a) of this section, no order for the distribution of the funds among the creditors shall be made within ninety (90) days from the first day of the publication of the order provided for in § 16-117-303.

History. Acts 1897 (Ex. Sess.), No. 48, §§ 4-6, 8, p. 115; C. &. M. Dig., §§ 5888-5890, 5892; Pope's Dig., §§ 7610-7612, 7614; A.S.A. 1947, §§ 36-204 — 36-206, 36-208.

CASE NOTES

Salaries of Employees.

One appointed receiver for an insolvent corporation will be entitled to a preference for the amount due him for services rendered as an employee of the corporation before it was placed in the hands of a receiver. German Nat'l Bank v. Young, 114 Ark. 370, 169 S.W. 1178 (1914).

16-117-307. Insolvent partnerships.

In the case of an insolvent partnership, all or any of the partners may unite in one (1) complaint filed in the county where either one resides; but in such cases, all individual as well as firm property must be turned over to the receiver, and the firm property and the individual property shall be administered separately, according to the rules of equity.

History. Acts 1897 (Ex. Sess.), No. 48, § 7, p. 115; C. & M. Dig., § 5891; Pope's Dig., § 7613; A.S.A. 1947, § 36-207.

Subchapter 4 — Assignments for Benefit of Creditors

SECTION.
16-117-401. Assignee to take possession of property — Inventory — Bond to be given.
16-117-402. Actions contesting assignment.
16-117-403. Contest of assignment due to fraud.
16-117-404. Sale or disposal of property.
16-117-405. Employment of counsel by assignee.
16-117-406. Account of assignee — Allowances to assignee.
16-117-407. Liability of assignee on bond.

Effective Dates. Acts 1859, No. 137, § 4: effective on passage.

Acts 1883, No. 38, § 4: effective on passage.

Acts 1887, No. 101, § 2: effective on passage.

Acts 1895, No. 109, § 6: effective on passage.

CASE NOTES

Analysis

In general.
Federal jurisdiction.

In General.

This subchapter was not repealed by § 16-117-301 et seq. Finch v. Watson Inv. Co., 184 Ark. 312, 42 S.W.2d 214 (1931).

Federal Jurisdiction.

This subchapter is not an insolvency law so as to conflict with federal bankruptcy law. Finch v. Watson Inv. Co., 184 Ark. 312, 42 S.W.2d 214 (1931).

16-117-401. Assignee to take possession of property — Inventory — Bond to be given.

(a) In all cases in which any person makes an assignment of his or her property for the benefit of his creditors, it shall be the duty of the assignee named in the deed of assignment to take immediate possession

of the property for the purpose of making an inventory and description of the property and for the care and preservation of the property.

(b) Within ten (10) days after taking possession of the property, the assignee shall file with the clerk of the circuit court a full, true, and complete inventory and description of the property together with his or her bond in double the amount of the supposed value of the property with good security, to be approved by the clerk, which bond shall be conditioned that the assignee shall faithfully execute the trust confided to him or her under the provisions of the deed of assignment, and the order of the court.

History. Acts 1895, No. 109, § 1, p. 162; C. & M. Dig., § 486; Pope's Dig., § 523; A.S.A. 1947, § 36-301; Acts 2003, No. 1185, § 239.

Amendments. The 2003 amendment, in (b), substituted "circuit court" for "court having equity jurisdiction" and "court" for "chancery court, or the judge thereof in vacation."

CASE NOTES

Analysis

In general.
Assignees.
Deeds of assignment.
Filing bond and inventory.
Jurisdiction.
Possession of property.
Preferences and reservations.

In General.

A voluntary assignment of property by a debtor does not operate as security for the debts, nor does it create a lien on the property. It does pass the absolute title to the assignee for the purpose of raising a fund to pay debts. As against the assignee, the debtor has no estate which he can convey until the purposes of the trust are satisfied. Bartlett, Reid & Co. v. Teah, 1 F. 768 (C.C.E.D. Ark. 1880) (decision under prior law).

Assignees.

Title to the property assigned vests in the assignee upon the execution and delivery of the deed by the assignor and cannot be defeated by an execution against the assignor coming to the hands of an officer after the delivery of the deed and before the filing of the schedule and bond. Clayton v. Johnson, 36 Ark. 406 (1880) (decision under prior law); Phelps v. Wyler, 67 Ark. 97, 56 S.W. 632 (1899).

The assignee in a deed of assignment cannot maintain an action against an officer for taking the assigned goods under a writ of attachment against the assignor until he has filed the inventory and given the bond required by statute. Thatcher v. Franklin, 37 Ark. 64; Falconer v. Hunt, 39 Ark. 68 (1882) (preceding decisions under prior law).

Omission of clerk of United States court to endorse his approval on an assignee's bond will invalidate the assignment. Noyes v. Neel, 100 F. 555 (8th Cir. 1900).

A trust created by an assignment for the benefit of creditor will not be permitted to fail because the assignee fails to qualify. The court will either appoint a new trustee or entertain a complaint by the beneficiaries to execute the trust. H.B. Claflin Co. v. Middlesex Banking Co., 113 F. 958 (E.D. Ark. 1902).

Where the trustees in a deed which was in effect a general assignment for creditors had not taken possession of the property, made an inventory, or given bond, they could not recover the debtor's property which was taken on execution in a suit by the creditor. Brown v. Wilkes, 153 Ark. 545, 241 S.W. 383 (1922).

Deeds of Assignment.

The failure to attach a schedule of the property described in the deed renders such deed inoperative. Dodd v. Martin, 15 F. 338 (C.C.E.D. Ark. 1882) (decision under prior law).

Any direction for the execution of the trust different from that provided by statute invalidates the assignment. Collier v. Davis, 47 Ark. 367, 1 S.W. 684 (1886);

Richmond v. Mississippi Mills, 52 Ark. 30, 11 S.W. 960 (1889) (preceding decisions under prior law).

A conveyance made directly to a creditor by way of paying or securing his debt is not ordinarily an assignment; but a mortgage in form may constitute an assignment by reason of the intention of the parties and the operation of the instrument, and such intention may be shown by parol evidence of facts collateral to those stated in the instrument. Richmond v. Mississippi Mills, 52 Ark. 30, 11 S.W. 960 (1889) (decision under prior law).

Where one or more instruments are executed by a debtor in whatsoever form or by whatsoever name with the intention to have them operate as an assignment and with the intention of granting the property conveyed absolutely to the trustee to raise a fund to pay debts, the transaction constitutes an assignment; and if not made in conformity to statutory provisions regarding the execution of the trust is void. Richmond v. Mississippi Mills, 52 Ark. 30, 11 S.W. 960 (1889); Box v. Goodbar, 54 Ark. 6, 14 S.W. 925 (1890); Robson v. Tomlinson, 54 Ark. 229, 15 S.W. 456 (1891); Charles F. Penzel Co. v. Jett, 54 Ark. 428, 16 S.W. 120 (1891); Marquese v. Felsenthal, 58 Ark. 293, 24 S.W. 493 (1893) (preceding decisions under prior law).

A deed without defeasance which makes an absolute conveyance to a person directing him to take possession and sell to pay certain creditors, reserving the surplus for the grantor, is an assignment for creditors. State ex rel. W. v. Dupuy, 52 Ark. 48, 11 S.W. 964 (1889) (decision under prior law).

The test to determine whether instruments executed by failing debtors in different forms constitute an assignment is: Can the grantee in such instruments be called to account for the proceeds of the conveyed property by other creditors? Fecheimer v. Robertson, 53 Ark. 101, 13 S.W. 423 (1890); Riggon v. Wolf, 53 Ark. 537, 14 S.W. 922 (1890) (preceding decisions under prior law).

A deed of assignment of property of a corporation executed by a majority of the directors merely at a meeting of which the absent directors had no notice is void. Simon v. Sevier County Co-op. Ass'n, 54 Ark. 58, 14 S.W. 1101 (1890) (decision under prior law).

A pledge of choses in action to a trustee for the benefit of certain creditors does not constitute an assignment. Goodbar v. Locke, 56 Ark. 314, 19 S.W. 924 (1892) (decision under prior law).

A provision in a deed of assignment authorizing the assignee to sue for notes and accounts is valid. Hill v. Woodberry, 49 F. 138 (8th Cir. 1892) (decision under prior law).

An assignment by partners granted "all the copartnership estate, property, assets and effects, choses in action, claims and demands" of the firm. The schedule of assets included land in another state which had been bought and paid for by the firm and deed thereon taken in the name of one partner. It was held that all title and interest in such land was conveyed by the assignment. Paxson v. Brown, 61 F. 874 (8th Cir. 1894) (decision under prior law).

General assignment of all property directing disposal in manner provided by law is not invalid. Adams v. Allen-West Comm'n Co., 64 Ark. 603, 44 S.W. 462 (1898).

Assignment was not invalidated by failure to provide expressly for disposition of residue. Moore v. Goodbar, 66 Ark. 161, 49 S.W. 571 (1899); Nelson v. Harper, 122 Ark. 39, 182 S.W. 519 (1916).

Married women may prefer claim of husband in general assignment. Phelps v. Wyler, 67 Ark. 97, 56 S.W. 632 (1899).

A conveyance to trustees for the payment of the grantor's debts without a defeasance in the event of payment by the grantor constituted a general assignment for the benefit of creditors. Brown v. Wilkes, 153 Ark. 545, 241 S.W. 383 (1922).

Filing Bond and Inventory.

A deed which stipulates that the assignee shall take possession of the property before giving bond or filing inventory is void. Rice v. Frayser, 24 F. 460 (C.C.E.D. Ark. 1885) (decision under prior law).

Assignment is not invalidated by failure to file inventory. Vahlberg v. Birnbaum, 64 Ark. 207, 41 S.W. 581 (1897).

A provision in a deed to the effect that an assignee shall not take possession of the property until filing bond is surplusage and does not authorize him to take possession before filing an inventory. Sanger v. Flow, 48 F. 152 (8th Cir. 1891).

Assignment is not invalidated by failure

to file bond in 10 days. Moore v. Goodbar, 66 Ark. 161, 49 S.W. 571 (1899); Nelson v. Harper, 122 Ark. 39, 182 S.W. 519 (1916).

Jurisdiction.

In the absence of the established grounds of equitable jurisdiction, a court of chancery has no authority, upon the application of a preferred creditor and with the consent of the assignor and assignee, to place the property in the hands of a receiver. Penzel Grocer Co. v. Williams, 53 Ark. 81, 13 S.W. 736 (1890) (decision under prior law).

Possession of Property.

When, in pursuance of a collateral agreement contemporary with the execution of the assignment, the assignor delivers possession to the assignee before the bond and inventory are filed, the assignment is void as to creditors. Gilkerson-Sloss Comm'n Co. v. London, 53 Ark. 88, 13 S.W. 513 (1890); Smith v. Patterson, 57 Ark. 537, 22 S.W. 342 (1893) (preceding decisions under prior law).

A direction in an assignment for the assignee to "forthwith" take possession vitiates the assignment. Lincoln v. Field, 54 Ark. 471, 16 S.W. 288 (1891) (decision under prior law).

When assigned property has been placed in the hands of a receiver, his possession cannot be interfered with under process from a court of concurrent jurisdiction. Walker v. Geo. Taylor Comm'n Co., 56 Ark. 1, 18 S.W. 1056, 19 S.W. 601 (1892) (decision under prior law).

A recital that the grantee make an inventory and give bond and, after first having given bond, take possession did not invalidate the assignment, as by its terms the inventory and bond were to precede the taking of possession. Excelsior Mfg. Co. v. Owens, 58 Ark. 556, 25 S.W. 868 (1894) (decision under prior law).

A provision in a deed of assignment that the assignee should not take possession of the property until he had filed an inventory and bond did not render evidence of a secret agreement to the contrary between the parties inadmissible. Badgett v. Johnson-Fife Hat Co., 85 F. 408 (8th Cir. 1898).

Trustee in assignment cannot recover property assigned after it has been taken under an execution. Brown v. Wilkes, 153 Ark. 545, 241 S.W. 383 (1922).

Preferences and Reservations.

An assignor may exact releases from his creditors as a condition of preference, but a reservation of the surplus either expressly or by operation of law to the assignor vitiates the assignment. McReynolds v. Dedman, 47 Ark. 347, 1 S.W. 552 (1886); Collier v. Davis, 47 Ark. 367, 1 S.W. 684 (1886); Wolf v. Gray, 53 Ark. 75, 13 S.W. 512 (1890) (preceding decisions under prior law).

The reservation in an assignment of a sum of money to be paid from the proceeds of the sale of the assigned property, equal to the value of his exemptions in personal property, vitiates the assignment. King v. Ruble, 54 Ark. 418, 16 S.W. 7 (1891) (decision under prior law).

A preference in an assignment for more than the debt due the preferred creditor with the intention to subsequently dispose of the surplus by paying another creditor therewith vitiates the assignment. Waples-Platter Co. v. Low, 54 F. 93 (8th Cir. 1893) (decision under prior law).

In a general assignment, assignor may exact release as condition of preference. King v. Hargadine-McKittrick Dry-Goods Co., 60 Ark. 1, 28 S.W. 514 (1894) (decision under prior law).

Cited: Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518, 53 S. Ct. 262, 77 L. Ed. 469 (1933).

16-117-402. Actions contesting assignment.

(a) All proceedings for the purpose of contesting the validity of the assignment shall be instituted within six (6) months from the date of the assignment, by filing complaint in the circuit court of the proper county, setting forth the grounds upon which the assignment is contested.

(b) Any creditor or person interested in the execution of the assignment may be made parties plaintiff or defendant to the proceeding.

(c) If, for any cause, the assignment is declared void, the assignment shall then be considered and treated as a general assignment of all his

or her property, not exempt from execution, for the benefit of all his or her creditors pro rata. The property shall be disposed of and distributed for their benefit under the orders and direction of the court. The assignee shall become subject to the control and direction of the circuit court in the same manner as if he or she had been appointed a receiver to take charge of the fund in court.

History. Acts 1895, No. 109, § 3, p. 162; C. & M. Dig., § 489; Pope's Dig., § 526; A.S.A. 1947, § 36-304.

CASE NOTES

Analysis

Collateral attacks.
Creditors.

Collateral Attacks.

The appointment of a receiver of assigned property cannot be questioned collaterally. Lowenstein v. Finney, 54 Ark. 124, 15 S.W. 153 (1854) (decision under prior law).

Creditors.

A preferred creditor attacking assignment cannot claim under it. Adler-Goldman Comm'n Co. v. Peoples Bank, 65 Ark. 380, 46 S.W. 536 (1898).

16-117-403. Contest of assignment due to fraud.

Any assignment for the benefit of creditors may be contested or attacked for fraud by any creditors. Proof of fraud on the part of the assignor shall be sufficient to invalidate the assignment, whether the assignee knew of it or not.

History. Acts 1887, No. 101, § 1, p. 194; C. & M. Dig., § 488; Pope's Dig., § 525; A.S.A. 1947, § 36-303.

CASE NOTES

Analysis

In general.
Conjoined assignments.
Fraud of assignor.
Remedies.
Withholding of property.

In General.

A fraudulent disposition of property invalidates a subsequent assignment only when it is part of the scheme to defraud and the provisions of the deed are calculated to promote that object. Hill v. Woodberry, 49 F. 138 (8th Cir. 1892); Excelsior Mfg. Co. v. Owens, 58 Ark. 556, 25 S.W. 868 (1894); Vahlberg v. Birnbaum, 64 Ark. 207, 41 S.W. 581 (1897).

Conjoined Assignments.

Fraud in one of three conjoined, but distinct, assignments did not affect the other two. Lazarus v. Camden Nat'l Bank, 64 Ark. 322, 42 S.W. 412 (1897).

Assignment of certain assets and a general assignment was held one transaction and fraudulent as reserving benefit to assignors. Winter v. Kirby, 68 Ark. 471, 60 S.W. 34 (1900).

Fraud of Assignor.

Prior to this section assignments could not be set aside for fraud of the assignor not participated in by the assignee or creditors. Hill v. Shrygley, 51 Ark. 56, 9 S.W. 845 (1888).

Title passes with the delivery of the deed and subsequent fraud will not violate it. Lowenstein v. Finney, 54 Ark. 124, 15 S.W. 153 (1891).

Intention to evade statutory provisions is not necessarily fraud. Worthen v. Griffith, 59 Ark. 562, 28 S.W. 286 (1894).

Mere general allegations that an assignment made by the assignor of his assets was made to defraud his creditors is insufficient. Baxter County Bank v. Copeland, 114 Ark. 316, 169 S.W. 1180 (1914).

Remedies.

Property fraudulently assigned may be attached. McReynolds v. Dedman, 47 Ark. 347, 1 S.W. 552 (1886) (decision under prior law).

Withholding of Property.

When a failing debtor makes an assignment, purporting to be of all his property, and intentionally withholds a valuable part, the assignment is fraudulent as to attaching creditors, although the property withheld was intended to, and actually did, pay other creditors. Probst & Hilb v. Welden, 46 Ark. 405 (1885) (decision under prior law); Penzel Grocer Co. v. Williams, 53 Ark. 81 (1890); Lazarus v. Camden Nat'l Bank, 64 Ark. 322, 42 S.W. 412 (1897).

The omission of a debtor to include in his assignment property held by a factor under a lien to secure a debt to himself, being in value less than the debt secured, is not a fraudulent withholding of assets. Wolf v. Gray, 53 Ark. 75, 13 S.W. 512 (1890).

An assignment purporting to convey all the property, not exempt, is vitiated by the intentional withholding of any material part other than the exemptions. Penzel Grocer Co. v. Williams, 53 Ark. 81, 13 S.W. 736 (1890).

The unintentional withholding of an immaterial portion of the assigned property, less in value than the assignor might have claimed as exempt, will not vitiate an assignment purporting to convey all of the assignor's property. Lowenstein v. Finney, 54 Ark. 124, 15 S.W. 153 (1891); Burks v. Goodbar, 58 Ark. 283, 24 S.W. 424 (1893).

Reservation of property claimed as exemptions does not invalidate the assignment. Baker v. Baer, 59 Ark. 503, 28 S.W. 28 (1894); King v. Hargadine-McKittrick Dry-Goods Co., 60 Ark. 1, 28 S.W. 514 (1894); Lazarus v. Camden Nat'l Bank, 64 Ark. 322, 42 S.W. 412 (1897).

Reservation of a homestead of more than its legal value will not invalidate an assignment. Mansur & Tibbetts Implement Co. v. Wood, 63 Ark. 362, 38 S.W. 898 (1897).

Fraudulent withholding of assets was not cured by subsequently claiming them as exempt. Lazarus v. Camden Nat'l Bank, 64 Ark. 322, 42 S.W. 412 (1897).

Removing goods after the deed is made and before delivery renders the deed fraudulent. Ball-Warren Comm. Co. v. Wills, 65 Ark. 270, 45 S.W. 687 (1898).

Insolvent firm preferring creditor of individual member is a withholding of assets and invalid. Bartlett v. Meyer-Schmidt Grocery Co., 65 Ark. 290, 45 S.W. 1063 (1898).

16-117-404. Sale or disposal of property.

(a) Upon the petition of any person interested in the execution of the assignment presented to the circuit court, setting forth the necessity for the sale or disposition of the property or any portion thereof not provided for in the deed of assignment, the court shall make such order in relation thereto as may seem just and for the best interest of the estate, setting forth the time and terms of the sale. The order shall be endorsed upon the petition and filed with the clerk of the court.

(b) Nothing in this act shall be construed as to authorize the assignee to sell or dispose of the property until he or she has executed his or her bond in accordance with the provisions of § 16-117-401.

History. Acts 1895, No. 109, §§ 2, 4, p. 162; C. & M. Dig., §§ 487, 490; Pope's Dig., §§ 524, 527; A.S.A. 1947, §§ 36-302, 36-305; Acts 2003, No. 1185, § 240.

Amendments. The 2003 amendment, in (a), substituted "circuit court" for "chancellor in court" and "court" for "chancellor."

Meaning of "this act". Acts 1895, No. 109 is codified as §§ 16-117-401, 16-117-402, 16-117-404, 16-117-405.

CASE NOTES

Analysis

Creditors' rights.
Provisions mandatory.

Creditors' Rights.

Election to claim under an assignment does not estop a creditor from enforcing certain other rights he has in assets held as collateral. Cockrill v. Joyce, 62 Ark. 216, 35 S.W. 221 (1896).

Creditors preferred by classes share pro rata in distribution in their class. Bank of Commerce v. Bland, 64 Ark. 226, 41 S.W. 762 (1897).

Provisions Mandatory.

The provisions of this section are mandatory and not directory. Jaffray v. McGehee, 107 U.S. 361, 2 S. Ct. 367, 27 L. Ed. 495 (1882).

16-117-405. Employment of counsel by assignee.

In case any portion of the property involved in the assignment becomes involved in litigation, that fact, when made known to the circuit court by the assignee, shall authorize the court to direct the assignee to employ counsel either to prosecute or defend in the litigation. The court shall stipulate in the order the percentage to be allowed the attorney as the fee for his or her services, which is to be paid out of the estate.

History. Acts 1895, No. 109, § 5, p. 162; C. & M. Dig., § 491; Pope's Dig., § 528; A.S.A. 1947, § 36-306; Acts 2003, No. 1185, § 241.

Amendments. The 2003 amendment, in the first sentence, substituted "circuit court" for "court, or the chancellor in vacation" and "court" for "chancellor" and in the second sentence, deleted "or chancellor" and substituted "his or her" for "his."

CASE NOTES

Attorney's Fees.

A provision in a deed of assignment for the payment of an attorney's fee for preparing and perfecting the assignment, and not for future services, was valid. Lowenstein v. Finney, 54 Ark. 124, 15 S.W. 153 (1891) (decision under prior law).

16-117-406. Account of assignee — Allowances to assignee.

(a) The assignee shall, in the circuit court of the county in which the assignment is made, after one (1) year from the date of the assignment, and every year thereafter until the proceeds of the property assigned are disposed of for the benefit of creditors, present to the court a fair written statement or current account in which the assignee shall charge himself or herself with the whole amount of the property assigned including all debts due or to become due and credit himself or herself with all sums of money expended, either by payment of debts or otherwise, exhibiting with the account the receipts and vouchers for all moneys paid out to the creditors of the assignment.

(b) The account so made out shall be filed in the office of the clerk of the circuit court of the county and become a part of the record thereof. Certified copies of the account shall be competent evidence of the facts contained therein, in any of the courts of this state, in the same manner and to the same extent as the records of any other court.

(c) The account shall be carefully examined by the court. Upon the examination the court shall allow the assignee for all debts with which he or she stands charged, which the court shall be satisfied could not be collected, and shall allow the assignee any sum not exceeding ten percent (10%) on all sums less than one thousand dollars ($1,000), and on all sums over one thousand dollars ($1,000), five percent (5%) for his or her risk and trouble in attending to the settlement of the assignment.

History. Acts 1859, No. 137, § 2, p. 151; 1883, No. 38, § 2, p. 60; C. & M. Dig., §§ 492, 493; Pope's Dig., §§ 529, 530; A.S.A. 1947, §§ 36-307, 36-308; Acts 2003, No. 1185, § 242.

Amendments. The 2003 amendment, in (a), substituted "in the circuit court" for "at the first term of the chancery court," deleted "at the corresponding term of the court" preceding "every year thereafter" and made gender neutral changes; and, in (b), substituted "circuit court" for "chancery court."

16-117-407. Liability of assignee on bond.

The assignee shall be liable upon his bond to anyone interested in the property included in the assignment for any loss that may occur by reason of his negligence or mismanagement of the property after the property comes into his possession. He shall also be liable for any failure upon his part to obey the orders of the circuit court in relation thereto or to carry out the provisions of the assignment.

History. Acts 1895, No. 109, § 2, p. 162; C. & M. Dig., § 487; Pope's Dig., § 524; A.S.A. 1947, § 36-302.

CASE NOTES

ANALYSIS

Right to sue.
Void assignments.

Right to Sue.

Any creditor may sue on the bond. The action is transitory, and he recovers only his pro rata share. Hays v. Comstock-Castle Co., 70 Ark. 151, 66 S.W. 649 (1902).

Void Assignments.

The mere fact that an assignment for the benefit of creditors may have been void could not impose liability on the assignees or their sureties where the assignees fully accounted for all assets coming into their hands. Finch v. Watson Inv. Co., 184 Ark. 312, 42 S.W.2d 214 (1931).

CHAPTER 118

MISCELLANEOUS ACTIONS

SECTION.
16-118-101. Agreed cases.
16-118-102. Obtaining discovery.
16-118-103. Gambling debts and losses.
16-118-104. Vendor's action for recovery of property.
16-118-105. Usurpation of office or franchise — Vacation of charters.
16-118-106. Alienation of affection and criminal conversation.

SECTION.
16-118-107. Civil action by crime victim.
16-118-108. Civil actions against sellers of drug paraphernalia.

Effective Dates. Acts 1877, No. 48, § 5: effective on passage.

Acts 1989 (3rd Ex. Sess.), No. 46, § 11: approved Nov. 14, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is an urgent need to validate otherwise legal marriages declared void by court decisions, to declare and preserve the legitimacy of the children born of such marriages, and to validate all property rights between the parties themselves and third persons; that it is in the best interest of the state that this act declaring such marriages take effect immediately. It is further determined that it is in the best interest of the state that the actions of alienation of affection and criminal conversation be abolished immediately. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage."

Acts 1997, No. 341, § 5: Mar. 5, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that victims of crime should be allowed to recover damages from the perpetrator of the crime; that in some instances the present law does not provide an adequate remedy to victims of crime; and that this act is immediately necessary to assist victims of crime. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 985, § 5. Mar. 31, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that gambling on credit creates a serious social and economic problem for the citizens of this state; and that least one court has applied the statute amended by this act contrary to the best interests of the citizens of this state and the public policy of this state; that this act clarifies the law; and that this act should go into effect as soon as possible to settle the issues enumerated. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-118-101. Agreed cases.

(a) Parties to a question which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends and present a submission of the case to any court which would have jurisdiction if an action had been brought.

(b) It must appear by affidavit that the controversy is real and the proceedings are in good faith to determine the rights of the parties.

(c) The court shall, upon submission of the case, hear and determine the case and render judgment as if an action were pending.

(d) The case, the submission, and the judgment shall constitute the record.

(e) The judgment shall be with costs, may be enforced, and shall be subject to reversal in the same manner as if it had been rendered in an action unless otherwise provided in the submission.

History. Civil Code, §§ 719-721; C. & M. Dig., §§ 1340-1342; Pope's Dig., §§ 1565-1567; A.S.A. 1947, §§ 34-401 — 34-403.

16-118-102. Obtaining discovery.

(a) No action to obtain a discovery shall be brought except in aid of some other action pending where any person or corporation is liable, either jointly or severally with others, by the same contract. In such a case, an action may be brought against any of the parties who are liable to obtain discovery of the names and residences of the others who are also liable.

(b)(1) In such actions, the plaintiff shall state in his or her complaint, in effect, that he or she has used due diligence, without success, to obtain the information asked to be discovered and that he or she does not believe the parties to the contract, who are known to him or her, have property sufficient to satisfy his or her claims.

(2) The complaint and the cost of the action shall be paid by the plaintiff unless the discovery is resisted.

History. Civil Code, § 788; C. & M. Dig., §§ 1037-1039; Pope's Dig., §§ 1239-1241; A.S.A. 1947, § 34-1101.

RESEARCH REFERENCES

Ark. L. Rev. Discovery Procedure, 7 Ark. L. Rev. 314.

CASE NOTES

ANALYSIS

"Fishing expeditions."
Names.

"Fishing Expeditions."

Where the state asked the court to require the defendant to disclose confidential information contained in its books, so that the state could use that information on which to predicate an action for recovery, relief sought was denied, because to allow the sovereign to exercise such a "fishing expedition" would be far in excess of the doctrine of common law of bona vacantia. State v. Phillips Petroleum Co., 212 Ark. 530, 206 S.W.2d 771 (1947).

Names.

Under allegations of complaint in suit to enforce liability of bank stockholders brought against inter-insurance exchange and two other parties alleged to be trustees holding large sums of money to which the exchange was entitled, this section was not applicable to obtain names of unknown members of the exchange. Vandover v. Lumber Underwriters, 197 Ark. 718, 126 S.W.2d 105 (1939).

16-118-103. Gambling debts and losses.

(a)(1) Any person who loses any money or property at any game or gambling device, or any bet or wager whatever, may recover the money or property by action against the person winning the money or property. The suit shall be instituted within ninety (90) days after the paying over of the money or property so lost.

(2) The heirs, executors, administrators, or creditors of the person losing any money or property at any game or gambling device, or on any bet or wager whatever, may have the same remedy as is provided in subdivision (a)(1) of this section for the person losing.

(3) Nothing in this subsection shall be so construed as to enable any person to recover any money or property lost on any turf race.

(b)(1) All judgments, conveyances, bonds, bills, notes, securities, and contracts, where the consideration or any part thereof is money or property won at any game or gambling device, or any bet or wager whatever, or for money or property lent to be bet at any gaming or gambling device, or at any sport or pastime whatever, shall be void.

(2) The assignment of any bond, bill, note, judgment, conveyance, contract, or other security shall not affect the defense of the person executing the assignment.

(c) Any matter of defense under this section may be specially pleaded or may be given in evidence under the general issue.

(d)(1) In all suits under this section, the plaintiff may call on the defendant to answer on oath any interrogatory touching the case, and if the defendant refuses to answer, the same shall be taken as confessed.

(2) The answer shall not be admitted as evidence against the person in any proceedings by indictment.

(e) It is the strong public policy of the State of Arkansas that gambling, whether regulated or unregulated, on credit is an unenforceable contract and the courts of this state shall not enforce gambling debts, regardless of whether the contract was entered into within this state or without this state.

History. Rev. Stat., ch. 68, §§ 1-8; C. & M. Dig., §§ 4899-4905; Pope's Dig., §§ 6112-6118; A.S.A. 1947, §§ 34-1601 — 34-1608; Acts 1999, No. 985, § 1; 2003, No. 1185, § 243.

Amendments. The 2003 amendment, in (d)(1), deleted "in the circuit court or before a justice of the peace."

RESEARCH REFERENCES

Ark. L. Rev. Bills and Notes — Holders in Due Course of Gaming Instruments, 6 Ark. L. Rev. 218.

CASE NOTES

Analysis

Applicability.
Burden of proof.
Docket entries.
Judgments, etc., void.
Public policy.
Recovery of money and property.
Right of action.

Applicability.

This section reaches only to notes or securities executed by the loser at a gaming device, or to the case where one has borrowed money or property to bet at a gaming device. Rumping v. Arkansas Nat'l Bank, 121 Ark. 202, 180 S.W. 749 (1915).

This section does not apply to a stakeholder nor affect his liability to a bettor who requests return of the wager while the contract is executory, but applies only to the bettor after execution of the contract. Williams v. Kagy, 176 Ark. 484, 3 S.W.2d 332 (1928).

This section does not apply to the recovery of money alleged to have been paid as a bribe. Womack v. Maner, 227 Ark. 786, 301 S.W.2d 438 (1957).

Burden of Proof.

One who pleads this section in defense against a note and mortgage fair on their face must prove the defense by clear and strong proof. Johnson v. Godden, 33 Ark. 600 (1878).

When a person is induced by fraud to part with a check, the burden is upon a subsequent holder to show that he was an innocent holder for value. Arkansas Nat'l Bank v. Martin, 110 Ark. 578, 163 S.W. 795 (1914).

In action on bank check signed by defendant, burden of proving defense that check was given for gambling debt was on defendant. Johnson v. Stout, 218 Ark. 599, 238 S.W.2d 97 (1951).

Docket Entries.

The docket entries of a justice of the peace are quasi-records and, when certified, are receivable in evidence. Gates v. Bennett, 33 Ark. 475 (1878).

Judgments, Etc., Void.

Before one can be considered a bona fide holder of commercial paper, he must have acquired without notice or knowledge of defenses or circumstances which would put the purchaser on inquiry that such defenses existed. Little v. Arkansas Nat'l Bank, 113 Ark. 72, 167 S.W. 75 (1914).

Note for money loaned to be bet in a dice game in which both maker and payee participated was void. Singley v. Norman, 202 Ark. 532, 150 S.W.2d 947 (1941).

The fact that the maker of a note given to a bank used part of the proceeds of the loan to pay gambling debts previously incurred did not render the note void under this section so as to release a guarantor on the note. Rauch v. First Nat'l Bank, 244 Ark. 941, 428 S.W.2d 89 (1968).

Public Policy.

Since Arkansas permits gambling in certain regulated contexts, and recognizes the opportunities to legally gamble in other states, there does not appear to be any Arkansas prohibition or policy against state-sanctioned and regulated gambling in Arkansas or any other state. In re Armstrong, 217 Bankr. 569 (Bankr. E.D. Ark. 1998).

Arkansas public policy does not necessarily preclude enforcement of valid and legal gambling debts incurred in another state. In re Armstrong, 217 Bankr. 569 (Bankr. E.D. Ark. 1998).

Recovery of Money and Property.

In an action to recover property lost on a horse race, it is incumbent upon the plaintiff to prove that the race was not a turf race. Nelson v. Waters, 18 Ark. 570 (1857).

This section does not authorize the recovery of an article sold for value to be raffled off. Carey v. Watkins, 97 Ark. 153, 133 S.W. 1016 (1911).

Property lost in gambling may be recovered in an action of replevin. Lane v. Alexander, 168 Ark. 700, 271 S.W. 710 (1925).

Person seeking to recover possession by force of money which he lost gambling within 90 days thereafter would not be guilty of robbery, although he may be guilty of assault. Davidson v. State, 200 Ark. 495, 139 S.W.2d 409 (1940).

Right of Action.

An action will not lie to recover property lost on a bet or wager against a third person, to whom the winner has sold it. Nelson v. Waters, 18 Ark. 570 (1857).

No court will aid a man whose cause of action is founded upon an illegal or immoral act. Whenever the action appears to arise ex turpi causa or from the transgression of the law, the courts refuse their assistance, not for the sake of the defendant, but because they will not aid such a plaintiff. Martin v. Hodge, 47 Ark. 378, 1 S.W. 694 (1886).

The only right of action given by this section is against the winner. Rumping v. Arkansas Nat'l Bank, 121 Ark. 202, 180 S.W. 749 (1915).

Without the presentation of a winning Classix ticket, a bettor is precluded from asserting a claim sounding in either tort or contract. Register v. Oaklawn Jockey Club, Inc., 306 Ark. 318, 811 S.W.2d 315 (1991), modified on reh'g, 306 Ark. 321, 821 S.W.2d 475 (1991).

Cited: In re Morse, 236 F. Supp. 960 (W.D. Ark. 1965); Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977); Woodend v. Southland Racing Corp., 337 Ark. 380, 989 S.W.2d 505 (1999); Meeks v. Red River Entertainment, 231 Bankr. 739 (E.D. Ark. 1999).

16-118-104. Vendor's action for recovery of property.

(a) In any action brought in the courts of this state for the recovery of money contracted for property in possession of the vendee, it shall not be lawful to include the property in any schedule intended to protect the property, or exempt it from seizure on attachment or sale on execution or other process issued from any court for the collection of any debt upon the claim of the plaintiff.

(b) In any such action the court or clerk shall issue, on petition of the plaintiff, duly verified, describing the property and stating its value at or after commencement of the action, an order, which may be embodied in the original summons if the order is issued at the same time as the original, stating the name of the court and the style of the action and directing the sheriff or other officer to take the property described in the petition and hold it subject to the orders of the court.

(c) The defendant may give bond for the retention of the property as in cases of orders of delivery of personal property.

(d) When it appears by affidavit of the plaintiff or by the return of the order of the court, or when it is shown by the plaintiff's petition, that the property has been disposed of or concealed so that the order cannot be executed, the court may compel the attendance of the defendant and examine him on oath as to the situation of the property, and the court punish a disobedience of its order as in cases of contempt.

History. Acts 1877, No. 48, §§ 1-4, p. 47; C. & M. Dig., §§ 8729-8732; Pope's Dig., §§ 11422-11425; A.S.A. 1947, §§ 34-2301 — 34-2304.

Cross References. Bond for retention of property in replevin, § 18-60-816.

RESEARCH REFERENCES

Ark. L. Rev. Conditional Sales in Arkansas, 4 Ark. L. Rev. 19.

The Old and the New: Article IX, 16 Ark. L. Rev. 145.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607.

CASE NOTES

Analysis

In general.
Bond for retention of property.
Lien of vendor.
Remedies available.
Remedy precluded.
Rights of vendors.

In General.

The section does not give a continuous, subsisting lien on the property for the purchase price, but only excepts it from exemption, and enables the vendor, in a suit for the purchase money, to seize it at once, if in control of the vendee, without alleging ordinary grounds of attachment. Bridgeford & Co. v. Adams, 45 Ark. 136 (1885).

Bond for Retention of Property.

There can be no summary judgment against the sureties on the delivery bond. Creanor v. Creanor, 36 Ark. 91 (1880).

The bond is absolute to perform the judgment of the court and cannot be avoided by an offer to return the property or by a plea that the vendor had no title to it. Mayfield v. Creamer, 39 Ark. 460 (1882).

Where, in a suit for the purchase money of a chattel, an order was issued directing the constable to take possession of the chattel and a stranger who had possession thereof delivered to the constable a sum of money in lieu of a bond and kept the chattel and thereafter interpleaded for it, it was error to treat the money as absolutely liable for whatever judgment might be rendered against the defendant instead of as a pledge for the return of the chattel in the event it should be liable for a judgment for the purchase money. Fondren v. Norton, 86 Ark. 410, 111 S.W. 647 (1908).

Where a bond executed by defendant provided that the property should be forthcoming and subject to the orders of the court, the sureties were discharged upon the delivery of the property. Rogers v. Tri-State Motor Sales Co., 165 Ark. 590, 265 S.W. 80 (1924).

Lien of Vendor.

When consideration is money value of services or other matters and the services are not performed, the lien exists. Swanger v. Goodwin, 49 Ark. 287, 5 S.W. 319 (1887).

When personal property is sold in another state and brought to Arkansas, this lien is enforceable, although there was none under the law of the state where the sale took place. Swanger v. Goodwin, 49 Ark. 287, 5 S.W. 319 (1887).

Right of redemption from sale under vendor's lien is exactly the same as from sale under mortgage. Pine Bluff, M. & N.O. Ry. v. Jones, 54 Ark. 81, 15 S.W. 15 (1891).

A vendor of personal property who retains the possession thereof has a lien thereon for the unpaid purchase money, which he may enforce if there is no contract to the contrary. Mattar Bros. v. Wathen, 99 Ark. 329, 138 S.W. 455 (1911).

This section contemplates that the lien claimant shall be the vendor of the chattels on which the lien is sought to be established. Borengasser v. Chatwell, 207 Ark. 608, 182 S.W.2d 389 (1944).

Contract for sale of personalty providing that seller should have title not only to the present assets of the business but also to any new merchandise purchased was ineffectual insofar as it attempted to put title to new property in seller so as to give a vendor's lien under this section, but it gave vendor an equitable lien on assets subsequently acquired. Borengasser v. Chatwell, 207 Ark. 608, 182 S.W.2d 389 (1944).

Judgment providing a lien on a tractor in favor of the tractor seller amounted to harmless error where the seller's asserted lien, based on retention of title as provided for in the written sale contract, could be enforced by further proceedings pursuant to this section. Traylor v. Huntsman, 253 Ark. 704, 488 S.W.2d 30 (1972).

Remedies Available.

No lien is given to the vendor of personal property upon property sold, only a remedy for impounding it to prevent the vendee from putting it beyond his reach pendente lite. Roach v. Johnson, 71 Ark. 344, 74 S.W. 299 (1903).

On failure to receive payment, the seller, where title is retained, may waive his right to the property and sue for the debt, in which case he can impound the

property. Coblentz & Logsdon v. L.D. Powell Co., 148 Ark. 151, 229 S.W. 25 (1921).

This section does not create an equitable lien in favor of the vendor of personal property who has retained title thereto until the purchase money is paid; he may either recover the property, or he may sue for the price, in which case the property is not exempt from execution. Olson v. Moody, Knight & Lewis, Inc., 156 Ark. 319, 246 S.W. 3 (1922).

Where the vendor of personal property takes notes for purchase money and retains title till they are paid, he has the right, on the failure of the vendee to pay the notes, to elect to treat the sale as absolute and sue to recover the debt and attach the property that his lien may be enforced against it. H.V. Beasley Music Co. v. Cash, 164 Ark. 572, 262 S.W. 656 (1924).

A vendor of personal property who has retained title thereto till the purchase price is paid may, on default in payment, treat the sale as absolute and sue to recover the debt and have the property attached to satisfy the judgment. Reed v. Webb, 165 Ark. 282, 262 S.W. 1001 (1924).

A vendor who has retained title in personal property until the purchase price is paid has only two remedies for a breach of the contract. He may treat the sale as canceled and bring replevin for the property, or treat the sale as absolute and sue for the unpaid purchase money and attach the property. Loden v. Paris Auto Co., 174 Ark. 720, 296 S.W. 78 (1927); Beene Motor Co. v. Dison, 180 Ark. 1064, 23 S.W.2d 971 (1930).

In an action by mortgagee to foreclose chattel mortgage on mortgagor's goods, where seller intervened and asked for judgment of unpaid balance of purchase price under conditional sale contract and that her lien be declared a first lien on all equipment sold under the contract, seller's action constituted an election to treat the sale as absolute and recover balance of purchase price, and prayer for lien did not change the nature of the action. Roy v. Notestine, 216 Ark. 447, 226 S.W.2d 66 (1950).

Specific attachment is available to a conditional seller. Davis v. Little, 225 Ark. 56, 279 S.W.2d 31 (1955).

Upon breach of a conditional sales contract the seller has two remedies: he can take possession of the merchandise, thereby canceling the obligation of the buyer to pay; or he can treat the sale as consummated and sue for the balance of the purchase price. Jones v. Cox, 227 Ark. 750, 301 S.W.2d 12 (1957).

Correct measure of damages for loss of use of truck where defendant, after having made first payment, defaulted and plaintiff brought action for balance due and had truck attached was the rental value or reasonable value of the use of the property. Mowery v. House, 234 Ark. 878, 355 S.W.2d 275 (1962).

Remedy Precluded.

This remedy provided by this section cannot be maintained when the property is held by assignee for the benefit of creditors. Bridgeford & Co. v. Adams, 45 Ark. 136 (1885).

The remedy provided by this section cannot be maintained when property has passed by death of vendee to his representatives. Blass v. Hood, 57 Ark. 13, 20 S.W. 544 (1892).

The remedy provided by this section cannot be maintained when the property is placed in receiver's hands. Halpern v. Clarendon Hardwood Lumber Co., 64 Ark. 132, 40 S.W. 784 (1897).

This remedy is not enforceable against purchaser for value, even if he had notice that purchase price had not been paid. Neal v. Cone, 76 Ark. 273, 88 S.W. 952 (1905); McComb v. Judsonia State Bank, 91 Ark. 218, 120 S.W. 844 (1909); Clements v. Hamilton-Brown Shoe Co., 99 Ark. 335, 138 S.W. 971 (1911); Lavender v. Finch, 144 Ark. 199, 222 S.W. 35 (1920).

This section does not authorize the vendor to follow the property into the hands of one who in good faith acquired from the vendee possession and ownership. Clements v. Hamilton-Brown Shoe Co., 99 Ark. 335, 138 S.W. 971 (1911).

Stock of groceries which had been regularly exposed to sale and replenished over 15-month period was not subject to attachment under this section in action by seller of grocery business against purchaser. Marvin v. Brooks, 225 Ark. 204, 281 S.W.2d 926 (1955).

Rights of Vendors.

The right of the vendor of personal property to have the property seized and applied to the purchase price is not personal to the vendor, but passes to the

assignee of the note given for the property. Creanor v. Creanor, 36 Ark. 91 (1880).

It is immaterial whether a note for purchase money is assigned before or after maturity. Morris v. Ham, 47 Ark. 293, 1 S.W. 519 (1886).

The vendor's action is not to enforce a lien, but to create one by way of attachment. Fox v. Arkansas Indus. Co., 52 Ark. 450, 12 S.W. 875 (1889).

The privilege of the vendor must be exercised while the property is in the possession of the vendee, and cannot take precedence of the right of a prior attaching creditor. Fox v. Arkansas Indus. Co., 52 Ark. 450, 12 S.W. 875 (1889).

After property has been seized under attachment by a third person, it is no longer in the power of the vendee, and the vendor by subsequent process against it can acquire no right beyond that of a second attaching creditor. Fox v. Arkansas Indus. Co., 52 Ark. 450, 12 S.W. 875 (1889); Bryan Brown Shoe Co. v. Block, 52 Ark. 458, 12 S.W. 1073 (1889).

Vendee garnished for purchase price of chattels cannot claim exemptions therein. Liddell v. Jones, 76 Ark. 344, 88 S.W. 961 (1905).

This section authorizes the sequestration of property only when found in the possession or control of the vendee. Holman v. Nutt, 120 Ark. 446, 179 S.W. 811 (1915).

The evidence supported the finding that there was no repossession and debt cancellation where the conditional seller took possession of the automobile and put it in company storage facilities after the conditional buyer had notified the assignee of the conditional sale contract that she was unable to continue payment and that the automobile was parked unattended on a public street, had mailed the assignee the keys for the automobile, had moved to another town, and had made no effort to reclaim the automobile after she had parked it on the street. Newbern v. Morris, 233 Ark. 938, 349 S.W.2d 662 (1961).

Cited: Woods v. Bournes, 228 Ark. 540, 309 S.W.2d 309 (1958); Newbern v. Morris, 233 Ark. 938, 349 S.W.2d 662 (1961).

16-118-105. Usurpation of office or franchise — Vacation of charters.

(a) In lieu of the writs of scire facias and quo warranto, or of information in the nature of a quo warranto, actions may be brought to vacate or repeal charters and prevent the usurpation of an office or franchise.

(b)(1) Whenever a person usurps an office or franchise to which he or she is not entitled by law, an action may be instituted against him or her, either by the state or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise.

(2) A person who continues to exercise an office after having committed an act, or omitted to do an act, of which the commission or omission, by law, created a forfeiture of his or her office, shall be subject to be proceeded against for a usurpation thereof.

(3)(A) It shall be the duty of the prosecuting attorney to institute the actions mentioned in this section against all persons who usurp county offices or franchises where there is no other person entitled thereto or the person entitled fails to institute the action for three (3) months after the usurpation.

(B) For usurpation of other than county offices or franchises, the action by the state shall be instituted and prosecuted by the Attorney General.

(4)(A)(i) When a person is adjudged to have usurped an office or franchise, he or she shall be deprived thereof by the judgment of the

court, and the person adjudged entitled thereto shall be reinstated in the office or franchise.

(ii) No one shall be adjudged entitled thereto unless the action is instituted by him or her.

(B) The court shall have power to enforce its judgment by causing the books and papers, and all other things pertaining to the office or franchise, to be surrendered by the usurper, and by preventing him or her from further exercising or using the office or franchise, and may enforce its orders by fine and imprisonment until obeyed.

(5) When the usurper has received fees and emoluments arising from the office or franchise, he or she shall be liable therefor to the person entitled thereto, who may claim the fees and emoluments in the action brought to deprive him or her of the office or franchise or in a separate action. If no one is entitled to the office or franchise, the fees and emoluments may be recovered by the state and paid into the public treasury.

(c) The action to repeal or vacate a charter shall be in the name of the state and brought and presented by the Attorney General or, under his or her sanction and direction, by an attorney for the state.

(d) The pleadings in the actions named in this section are not required to be verified by affidavit unless prosecuted by a private individual.

History. Civil Code, §§ 522, 523, 525-531; C. & M. Dig., §§ 10325-10332; Pope's Dig., §§ 14325-14332; A.S.A. 1947, §§ 34-2201 — 34-2209; Acts 2003, No. 1185, § 244.

Amendments. The 2003 amendment, in (a) through (b)(1), deleted "by proceedings at law" preceding "may be"; and made gender neutral changes.

Cross References. Actions by state to repeal charter of corporation, § 16-106-102.

Involuntary dissolutions of corporation, action brought by attorney general, §§ 4-26-1107, 4-26-1108.

Violation of Unfair Practice Act, forfeiture of charter, § 4-75-205.

RESEARCH REFERENCES

Ark. L. Rev. Wills, Constitutional Crisis: Can the Governor (or Other State Officeholder) Be Removed from Office in a Court Action after Being Convicted of a Felony?, 50 Ark. L. Rev. 221.

UALR L.J. Heller and Sallings, Survey of Public Law, 3 UALR L.J. 296.

Annual Survey of Caselaw, Election Law, 26 UALR L.J. 904.

CASE NOTES

Analysis

Applicability.
Burden of proof.
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—County offices or franchises.
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Nature of remedy.
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Proceedings permitted.
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Applicability.

The statute only applies to the usurpation or exercising of an office to which one

is not entitled following an election; it does not apply to an action challenging a candidate's qualifications to appear on a ballot as a candidate for public office. Jacobs v. Yates, 342 Ark. 243, 27 S.W.3d 734 (2000).

Burden of Proof.

In a usurpation proceeding, plaintiff has the burden of establishing his qualifications to hold the office. Jones v. Duckett, 234 Ark. 990, 356 S.W.2d 5 (1962).

Election Contests.

This section includes ordinary election contests for office. Wood v. Miller, 154 Ark. 318, 242 S.W. 573 (1922).

This section does not authorize a defeated candidate to contest the election by a suit in his own name, or to institute ouster proceedings, unless such candidate is able to show that he is entitled to the office. Cherry v. Webb, 196 Ark. 17, 115 S.W.2d 865 (1938).

Suits to contest municipal elections are triable by the circuit court. Purdy v. Glover, 199 Ark. 63, 132 S.W.2d 821 (1939).

Although an incumbent state senator had been defeated in the primary for reelection, he was ineligible to serve as a member of the county board of election commissioners. Jones v. Duckett, 234 Ark. 990, 356 S.W.2d 5 (1962).

Action by defeated candidate contesting winner's eligibility for office brought under this section is not a contest of the election, for there is nothing to contest concerning the results of the election. Jessup v. Hancock, 238 Ark. 866, 385 S.W.2d 24 (1964).

Where plaintiff in school board election could lay no claim to having received more votes than the defendant, for, even after the revised count conducted by the court, each party received equal number of votes, plaintiff did not qualify as a person authorized to bring suit under this section. Martin v. Hefley, 259 Ark. 484, 533 S.W.2d 521 (1976).

Action allowed under this section was a petition for a writ of quo warranto; thus, where the justice of the peace was certified as the winner of an election to Justice of the Peace and it was alleged that he was not qualified to serve, such that the action available was a petition for a writ quo warrant, the action had to be brought by the prosecuting attorney. Pederson v. Stracener, 354 Ark. 716, 128 S.W.3d 818 (2003).

Institution of Actions.

Quo warranto in the name of the state will issue only where the whole community is interested and will not be granted at the instance of an individual for the determination of a private right. Ramsey v. Carhart, 27 Ark. 12 (1871).

Action brought by the Attorney General in the name of the state in lieu of quo warranto is proper proceeding to test validity of organization of school district. Beavers v. State, 60 Ark. 124, 29 S.W. 144 (1895).

A joint action for the usurpation of an office may be maintained by the state and the party entitled to the office. Whittaker v. Watson, 68 Ark. 555, 60 S.W. 652 (1901); Barnett v. McCray, 169 Ark. 833, 277 S.W. 45 (1925).

The remedy for usurpation of the office of road overseer, not having been vested elsewhere, is by an action in the circuit court brought either by the state or the person entitled to the office. State ex rel. Att'y Gen. v. Sams, 81 Ark. 39, 98 S.W. 955 (1906).

In an action to contest the right to hold office, with one alleged to be a usurper thereof, it devolves upon the party complaining in order to state a cause of action to allege that the defendant was not acting under an election to office and is a usurper; it is not sufficient merely to set forth facts invalidating the election. Ferguson v. Wolchansky, 133 Ark. 516, 202 S.W. 826 (1918).

The prosecuting attorney may be compelled by mandamus to bring ouster suit. Vanhoose v. Yingling, 172 Ark. 1009, 291 S.W. 420 (1927).

Prosecuting attorney is authorized to maintain actions in the nature of quo warranto proceedings to oust any and all persons from offices to which they are not eligible or the right to hold which they may have forfeited. State ex rel. Robinson v. Jones, 194 Ark. 445, 108 S.W.2d 901 (1937).

Suit to oust elected candidate or to declare him ineligible may be brought only by the prosecuting attorney, by proceeding in the nature of quo warranto. Cherry v. Webb, 196 Ark. 17, 115 S.W.2d 865 (1938).

Where elected justice of peace had acted as judge of election, his election being void, incumbent justice had the right to contest his eligibility to hold the office and to continue in office until a successor to him qualified. Faulkner v. Woodard, 203 Ark. 254, 156 S.W.2d 243 (1941).

—County Offices or Franchises.

A director of a levee district is not a county officer within the meaning of this section. State ex rel. Going v. Higginbotham, 84 Ark. 537, 106 S.W. 484 (1907).

This section does not authorize private citizens to bring a suit to oust a usurping county officer, the only persons authorized to bring such suits being the defeated candidate and the prosecuting attorney. Vanhoose v. McGregor, 172 Ark. 1012, 291 S.W. 422 (1927).

—Other Than County Offices or Franchises.

Municipal officers are not county officers within the meaning of this section, and the action in such case cannot be brought by prosecuting attorney, but must be prosecuted by the Attorney General. State v. Tyson, 161 Ark. 42, 255 S.W. 289 (1923).

The challenge of the right to hold the office of town marshal is within the usurpation statute. State v. Tyson, 161 Ark. 42, 255 S.W. 289 (1923).

An action by a taxpayer to compel the defendant to repay city money received as city attorney and enjoin him from collecting any further sums is an action at law against the usurpation of office which cannot be brought by a taxpayer. Scott v. McCoy, 212 Ark. 574, 206 S.W.2d 440 (1947).

A private individual has no right to question the title to the office of municipal judge; it can only be questioned by the Attorney General. Logan v. Harris, 213 Ark. 37, 210 S.W.2d 301 (1948); Beshear v. Clark, 292 Ark. 47, 728 S.W.2d 165 (1987).

The Attorney General is the proper person to institute proceedings for the ouster of a member of the Game and Fish Commission, but when such a member was properly holding office, the Attorney General properly refused. Drennen v. Bennett, 230 Ark. 330, 322 S.W.2d 585 (1959).

In action to remove legislator or prevent legislator from exercising his powers because he moved to another district from that in which he was elected, citizen was not the proper party to bring a writ of quo warranto because, under subdivision (b)(3)(B) of this section, for usurpation of other than county officers, such an action had to be instituted by the Attorney General; moreover, the matter was one to be determined by the Arkansas House of Representatives, not the circuit court. Magnus v. Carr, 350 Ark. 388, 86 S.W.3d 867 (2002).

Jurisdiction.

Chancery will not give relief by ousting one improperly holding office, as there is a plain, complete, and adequate remedy at law. Lucas v. Futrall, 84 Ark. 540, 106 S.W. 667 (1907).

Where jurisdiction, with respect to claims to public office, is not expressly, or by necessary implication, placed elsewhere, the circuit court, under the Arkansas Constitution, has residuary jurisdiction, and it is immaterial whether the actions be termed election contests, proceedings in the nature of quo warranto, or suits to oust usurpers. Purdy v. Glover, 199 Ark. 63, 132 S.W.2d 821 (1939).

Liability for Fees and Emoluments.

Rule applicable to damage cases has no applicability to the case of an officer suing for his salary, liability being not upon contract, and officer wrongfully excluded from office may recover salary without crediting his earnings thereon. Gentry v. Harrison, 194 Ark. 916, 110 S.W.2d 497 (1937).

Insurance commissioner and fire marshal deprived of his office by another prior to abolition of office, because of invalidity of emergency clause in statute, was entitled to amount of salary he would have received from time he was deprived of office until 90 days after adjournment of the General Assembly. Gentry v. Harrison, 194 Ark. 916, 110 S.W.2d 497 (1937).

A person acting as city marshal of a city of the second class although a de facto city marshal, without being duly elected is a usurper and where he has received fees and emoluments arising from the office or franchise, he shall be liable therefore to the person entitled thereto. A person entitled to the office may bring an action to recover the fees and the office. Sitton v. Burnett, 216 Ark. 574, 226 S.W.2d 544 (1950).

Mayor who illegally received money for

labor in construction of pipeline from water and light plant was not required to refund money to governmental agencies, since he did not receive money as an officer, but as a laborer. Revis v. Harris, 219 Ark. 586, 243 S.W.2d 747 (1951).

Mayor who illegally served as municipal judge while mayor was required to refund to respective government agencies the amount received as municipal judge. Revis v. Harris, 219 Ark. 586, 243 S.W.2d 747 (1951).

Nature of Remedy.

An action to recover an office is at law. Lucas v. Futrall, 84 Ark. 540, 106 S.W. 667 (1907).

Statutory remedy against usurpation of office will be considered cumulative rather than exclusive of existing remedies, and though statutory proceeding is in lieu of the ancient common-law writ of quo warranto, it does not abolish the remedies for which that writ was created. State ex rel. Robinson v. Jones, 194 Ark. 445, 108 S.W.2d 901 (1937).

Notice.

There is no authority for a circuit court to remove a county officer without any notice; notice is the foundation of due process of law, and where there was none, an order for the removal of judge would be invalid. Anderson v. State, 266 Ark. 192, 583 S.W.2d 14 (1979).

Proceedings Not Permitted.

An action brought by a town marshal to restrain the mayor and recorder from collecting liquor licenses as being part of the marshal's duties could not be maintained under this section as a usurpation of office. Moody v. Lowrimore, 74 Ark. 421, 86 S.W. 400 (1905).

This section does not confer upon the attorney general the authority to maintain quo warranto proceedings to question the right of a licensed eclectic physician to practice, as jurisdiction over such physicians is vested in the eclectic state medical board. Schirmer v. Light, 222 Ark. 693, 262 S.W.2d 143 (1954).

Proceedings Permitted.

Although there was no common law right to a jury trial in usurpation-of-office cases where the plaintiff merely requested ouster of the alleged usurper, plaintiff has a constitutional right under Ark. Const., Art. 2, § 7, to a jury trial if he also made a claim for fees or emoluments. Hopper v. Garner, 328 Ark. 516, 944 S.W.2d 540 (1997).

Resignation.

Where plaintiff attempted to withdraw his resignation by letter stating he would resign unless a majority of the council members agreed he shouldn't, and the council subsequently voted to reject the withdrawal of resignation, the jury could have reasonably concluded that the resignation was never effectively withdrawn. Hopper v. Garner, 328 Ark. 516, 944 S.W.2d 540 (1997).

An instruction on resignation by implication was proper where a former city attorney represented two criminal defendants before bringing a usurpation-of-office action. Hopper v. Garner, 328 Ark. 516, 944 S.W.2d 540 (1997).

Trial by Jury.

The right of trial by jury does not extend to an action brought to prevent usurper from exercising an officer or franchise. Wheat v. Smith, 50 Ark. 266, 7 S.W. 161 (1887).

In quo warranto proceedings in courts of original jurisdiction brought under statutory provisions to annul, vacate, and cancel a charter or franchise, or any other property right (not including title to public office), the right of trial by jury of issues of fact is a constitutional right. Louisiana & N. W. R.R. v. State, 75 Ark. 435, 88 S.W. 559 (1896).

Cited: Drennen v. Bennett, 230 Ark. 330, 322 S.W.2d 585 (1959); Langston v. Johnson, 255 Ark. 933, 504 S.W.2d 349 (1974); May v. Edwards, 255 Ark. 1041, 505 S.W.2d 13 (1974); May v. Edwards, 258 Ark. 871, 529 S.W.2d 647 (1975); Campbell v. State, 300 Ark. 570, 781 S.W.2d 14 (1989); Pederson v. Stracener, 354 Ark. 716, 128 S.W.3d 818 (2003).

16-118-106. Alienation of affection and criminal conversation.

The actions of alienation of affection and criminal conversation are abolished.

History. Acts 1989 (3rd Ex. Sess.), No. 46, § 6.

Publisher's Notes. Acts 1989 (3rd Ex. Sess.), No. 46, § 8, provided that § 6 of the act does not apply to litigation pending before the effective date of the act.

RESEARCH REFERENCES

ALR. Action for intentional infliction of emotional distress against paramours. 99 ALR 5th 445.

UALR L.J. Survey, Family Law, 12 UALR L.J. 631.

CASE NOTES

Alienation of Affection.

Arkansas has not recognized the claim of alienation of affection by a parent with respect to a child. Poindexter v. Armstrong, 934 F. Supp. 1052 (W.D. Ark. 1994).

Since Arkansas has abolished the claim of alienation of affection, the courts are not likely to reinstate the same in the guise of the tort of outrage. Poindexter v. Armstrong, 934 F. Supp. 1052 (W.D. Ark. 1994).

Cited: Treiber v. Hess, 301 Ark. 97, 782 S.W.2d 43 (1990); Cherepski v. Walker, 323 Ark. 43, 913 S.W.2d 761 (1996).

16-118-107. Civil action by crime victim.

(a)(1) Any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct.

(2) The burden of proof for showing conduct that constituted a felony shall be a preponderance of the evidence.

(3) If the person who is injured or damaged prevails, he or she shall be entitled to recover costs and attorney's fees.

(b) The action may be maintained by the person who was injured or damaged or, after the person's death, the executor, administrator, or representative of his or her estate.

(c) The remedy provided in this section shall be in addition to any other remedies in law or equity.

History. Acts 1997, No. 341, § 1.

Cross References. Crime victims reparations, § 16-90-701 et seq.

CASE NOTES

Respondeat Superior.

Although an employer was not vicariously liable for the actions of his company's employee in killing the employer's neighbor, the verdict and damages award were upheld based on the employer's own conduct as an accomplice to manslaughter. Costner v. Adams, 82 Ark. App. 148, 121 S.W.3d 164 (2003).

16-118-108. Civil actions against sellers of drug paraphernalia.

(a) As used in this subchapter, "drug paraphernalia" means those items as defined by §§ 5-64-101, 5-64-403, and 5-64-505.

(b)(1) Any person who becomes addicted to any controlled substance, as a result of the use of any drug paraphernalia sold to him or her by a

store dealing in drug paraphernalia items, has a cause against the seller if the person can prove that the item purchased from the seller's store contributed to his or her addiction.

(2) Any parent or guardian may bring a cause of action described in subsection (a) of this section on behalf of a minor.

(c) Any third person injured or killed by a person using a controlled substance, whose use was caused or aided by the use of drug paraphernalia sold to the person by a store dealing in drug paraphernalia items, has a cause of action against the seller if the third person can prove that the item purchased from the store contributed to the person's use and the person's use proximately caused the third person's injury or death.

(d) Any person who requires hospitalization or outpatient service for drug abuse or a related medical problem is entitled to recover from any store that has sold any drug paraphernalia to the person and reimbursement for any such costs incurred.

(e) Any federal or state agency that provides medical or kindred treatment to any person who is addicted to drugs as a result of the use of any drug paraphernalia may cause litigation to be commenced against any store or individual that has sold an item of drug paraphernalia that contributed to the person's drug abuse and subsequent treatment, for the purpose of collecting the reasonable costs incurred by the federal or state agency.

(f) Prior to awarding any damages under this subchapter, the trier of fact shall make written determinations regarding the following questions:

(1) That a reasonably prudent person acting as the seller would have known or should have known that the item sold would be utilized in the unlawful use of drugs;

(2) Considering all the facts and circumstances surrounding the sale, including the physical characteristics of the business establishment and its method of operation, that the seller knew or should have known that the items sold would be utilized in the unlawful use of drugs.

History. Acts 1981, No. 971, §§ 1-6; A.S.A. 1947, § 82-2645, § 82-2646, § 82-2647, 82-2648, 82-2649, 82-2650.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 4 UALR L.J. 583.

CHAPTER 119

PRESERVATION AND RESTORATION OF RECORDS

SECTION.
16-119-101. Other methods of restoration unaffected by chapter.
16-119-102. Proceedings for restoring records generally.

SECTION.
16-119-103. Restoration of destroyed judgments generally.
16-119-104. Restoration of destroyed judgments — Procedural conditions.
16-119-105. Restoration of records in pending cases.
16-119-106. Papers evidencing title to real or personal property recorded anew.
16-119-107. Restoration of marriage records.
16-119-108. Restoration of record of married person's schedule of property.
16-119-109. Restoration of bonds of executors, administrators, or guardians.
16-119-110. Certified copies of restored record admissible as evidence.
16-119-111. Record books unfit for preservation — Transcriptions to take place of originals.

Cross References. Microfilming of state records, § 25-18-102.

Preambles. Acts 1855, p. 113 contained a preamble which read: "Whereas on the sixteenth day of September, A. D. one thousand eight hundred and fifty-four the office of the clerk of the circuit court, and ex officio recorder for Prairie county, in the State of Arkansas, was destroyed by fire, whereby the records of the circuit, county and probate courts of said county, as well as the different papers relating to the proceeding in said different courts as well as the records of deeds, mortgages, and other written evidence of and muniments of title to lands, slaves and other property, required by the laws of this State to be admitted of record, together with many of the originals of said written evidences and muniments of title, together with certificates of marriage, schedules of the separate property of and of property acquired through married women, filed in the office of the recorder for said courts, under and by virtue of the laws of this State, were destroyed by said fire, whereby great confusion has been created in the proceedings of said courts; and also with regard to titles to property, proofs of marriages, etc.; and it being desirable to remedy the disagreeable results that have already attended and to prevent, if possible, any further disagreeable results likely otherwise to attend such loss by fire, by legislative action, therefore...."

Acts 1868, No. 54 contained a preamble which read: "Whereas, the records of certain counties in this State are in a much dilapidated and worn condition on account of having been hurriedly removed during the war, and in many instances, having been subject to rain and dampness during such removal; and, as is the case in Jefferson and other counties, many of the record books are entirely in pieces, and there is much danger of valuable records being lost; therefore...."

Effective Dates. Acts 1855, § 9, p. 113: effective on passage.

Acts 1857, § 4, p. 81: effective on passage.

Acts 1868, No. 54, § 3: effective on passage.

Acts 1997, No. 1044, § 5: Apr. 2, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present statutory procedure for the restoration of lost marriage records requires chancery court action which results in more expense to the parties and more time delay than is necessary; that a more inexpensive and efficient mechanism would be to utilize the county court; that this act grants that power to the county court; and that this act should go into effect as soon as possible in order that those couples whose marriage records have been lost can use an expedited procedure for reestablishing their marriage relationship as soon as possible. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-119-101. Other methods of restoration unaffected by chapter.

Nothing in this chapter shall be so construed as to hinder or prevent any lost, burned, or destroyed records, papers, or proceedings from being reinstated and reestablished by any other mode known to or recognized by laws existing prior to January 10, 1857, should the other mode be deemed more convenient and work no wrong or injustice to the parties interested.

History. Acts 1855, § 7, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8351; Pope's Dig., §§ 10938, 10947; A.S.A. 1947, §§ 16-409, 16-412.

Publisher's Notes. As enacted, Acts 1855, p. 113, applied only to the reinstatement of the records of Prairie County, Arkansas, which were destroyed by fire on September 16, 1854. Acts 1857, p. 81, however, extended the provisions of the act to all cases of lost, destroyed, or burned records, papers, or proceedings in the state.

16-119-102. Proceedings for restoring records generally.

In adjudicating upon any petition filed under the provisions of this chapter, similar proceedings shall be had as upon any other cases pending in the court with the same right of appeal and of suing out writs of error to the high legal tribunals.

History. Acts 1855, § 7, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8351; Pope's Dig., §§ 10938, 10947; A.S.A. 1947, §§ 16-409, 16-411, 16-412.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

16-119-103. Restoration of destroyed judgments generally.

(a) If any person or persons, either in the person's or persons' own right or as guardian or guardians, executor or executors, or administrator or administrators, have obtained any allowance, judgment, or decree, either for money or any kind of property, or for the performance of any act, in a probate, county, or chancery court existing in any county in the State of Arkansas prior to July 1, 2001, or in any circuit court against any person or persons, either in the person's or persons' own right or as guardian or guardians, executor or executors, or administrator or administrators, the person or persons may file in the office of the clerk of the circuit court a petition, addressed to the court, setting forth therein the amount, nature, and substance of the allowance, judgment, or decree and that the allowance, judgment, or decree has been lost, destroyed, or burned.

(b) Upon the hearing of the petition, if the court is advised of the truth of the matter contained in the petition, it shall thereupon order, adjudge, or decree, as the case may be, that the allowance, judgment, or decree, in conformity with the allegations in the petition, be reinstated upon the records of the court to have the same force and effect and to relate back and take effect from the time when the original allowance, judgment, or decree was rendered.

History. Acts 1855, § 1, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8344, 8346; Pope's Dig., §§ 10938, 10939, 10942; A.S.A. 1947, §§ 16-403, 16-411, 16-412; Acts 2003, No. 1185, § 245.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

Amendments. The 2003 amendment rewrote (a).

16-119-104. Restoration of destroyed judgments — Procedural conditions.

No reinstating order, sentence, or decree shall be rendered by the court, unless:

(1) The petition is verified by affidavit and has been filed in the office of the clerk of the court thirty (30) days previous to the term of the court at which the application is intended to be made; and

(2) Due notice of the intended application, setting forth, in a brief manner, the object and intent of the application, is given to the adverse party or parties, either by personal service, by delivering a copy of the notice in writing at least thirty (30) days before the first day of the term of court at which the intended application is to be made, or by publication in some newspaper published in the county for two (2) consecutive weeks, the last publication to be at least six (6) weeks before the first day of the term of the court at which the intended application is to be made. However, if there is no newspaper printed in the county, then the publication shall be made in some newspaper printed in Little Rock, Arkansas.

History. Acts 1855, § 1, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8344, 8346; Pope's Dig., §§ 10938, 10939, 10942; A.S.A. 1947, §§ 16-403, 16-411, 16-412.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

16-119-105. Restoration of records in pending cases.

(a) In case any matter or proceeding pending in the county or circuit courts of any county is still undisposed of, and the records or original papers on file in either of the courts are lost, destroyed, or burned, any person or persons legally interested in any manner whatever in any such matters or proceedings may file a petition in the office of the clerk of the court in which the matter or proceeding is pending, addressed to the court, setting forth the nature and substance of the matter or proceedings, or of the original papers filed and lost, destroyed, or burned, and praying that the original papers may be reinstated upon the record.

(b) Thereupon, if the court is satisfied and advised of the truth of the allegation in the petition, it shall order, adjudge, or decree that the original papers, pursuant to the allegation of the petitioner, be filed and reinstated upon the records of the court, to have the same force and effect and to relate back and take effect from the time when the original was filed or the original matter or proceedings were had.

(c) No such order, judgment, or decree shall be made by any of the courts unless the applicant shall have given to the other party or

parties interested or concerned in the matters or proceedings due notice of the intended application, according to the provisions regarding notice in § 16-119-104.

History. Acts 1855, § 2, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8344, 8346; Pope's Dig., §§ 10938, 10940, 10942; A.S.A. 1947, §§ 16-404, 16-411, 16-412; Acts 2003, No. 1185, § 246.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

Amendments. The 2003 amendment, in (a), deleted "probate" preceding "county," "or chancery" following "circuit," "judge or chancellor of the" preceding "court" and "as the case may be" following "court" and made related changes.

CASE NOTES

Analysis

Matters not part of record.
Power of court.
Substitution of copies.

Matters Not Part of Record.

Where at the trial parties agreed that oral testimony be taken in shorthand by court stenographer, to be transcribed only upon request of appealing party, in the event of an appeal, and the notes were burned when the court house was destroyed by fire, chancellor's refusal to supply and restore the evidence was held not error, since notes were not a part of the court record, having not been filed, and appellants were not diligent in prosecuting their appeal. Stewart v. Hulett, 196 Ark. 403, 117 S.W.2d 1067 (1938).

Power of Court.

This section does not take away the inherent power of the court to restore its lost records. Fort Smith Auto. & Supply Co. v. Nedry, 100 Ark. 485, 140 S.W. 711 (1911); Cochran v. State, 169 Ark. 503, 275 S.W. 895 (1925).

The fact that the statutory method of restoring lost records was not followed was held to be immaterial where both parties submitted question as to whether the record had been lost to the court and took evidence on the question. Williams v. Dawson, 185 Ark. 1190, 46 S.W.2d 634 (1932).

Substitution of Copies.

The substitution of copies of pleadings for lost originals, without complying with this section, was not error in the absence of any contention that the substituted pleadings were incorrect or that appellant was prejudiced by their filing. Spadra Creek Coal Co. v. Eureka Anthracite Coal Co., 104 Ark. 359, 148 S.W. 644 (1912).

16-119-106. Papers evidencing title to real or personal property recorded anew.

(a) In all cases in which any deed of conveyance, title bond, mortgage, deed, or other written muniment of title of or concerning any property, either real or personal, which by the laws of this state could be admitted to record, have been admitted of record in any county and the record thereof has been lost, destroyed, or burned, but the original of the instrument of conveyance, or copy duly certified according to law, is in the possession of the person entitled to the instrument of conveyance, the original or duly certified copy of the instrument of conveyance may be recorded anew in the office of the clerk and ex officio recorder of the county. The record shall relate back and have full force and effect from the date of the first record of the instrument of conveyance.

(b)(1) In case no original or duly certified copy has been preserved, then any person or persons interested in the instrument of conveyance,

or the person's or persons' heirs, executor or executors, administrator or administrators, or guardian or guardians, may file a petition in the office of the clerk of the circuit court of any such county, addressed to the circuit court thereof, setting forth the names and relations of the different parties to the instrument of conveyance, and the subject matter thereof, and praying that the instrument of conveyance may be ordered to be admitted of record in the office of the recorder of the county.

(2) If the court is sufficiently advised of the truth of the matters contained in the petition, it shall decree that the prayer of the petition be allowed and that a copy of the petition and decree be certified, under the seal of the court, to the recorder of the county to be by him or her recorded. The record thereof shall relate back and have full force and effect from the date of the original record.

(3) No such decree shall be made by the court unless previous notice of the intended application has been given to the other party or parties to the instrument of conveyance, or to their heirs, executors, or administrators according to the terms required in § 16-119-104.

History. Acts 1855, § 3, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8345, 8346; Pope's Dig., §§ 10938, 10941, 10942; A.S.A. 1947, §§ 16-405, 16-411, 16-412; Acts 2003, No. 1185, § 247.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

Amendments. The 2003 amendment, in (b)(1), substituted "circuit court" for "chancellor" and deleted "at least thirty (30) days before the first day of the term of the court at which the application is intended to be made" preceding "setting forth the names" and made gender neutral changes.

16-119-107. Restoration of marriage records.

(a)(1) In cases where any marriage has been legally solemnized in any county, and the certificate of marriage required by law to be filed in the office of the recorder for the county, together with the record thereof, has been lost, destroyed, or burned, it shall be the duty of the person who solemnized the marriage, at the request and on the demand of either of the parties between whom the marriage was solemnized, to furnish him, her, or them, under his hand, a certificate of marriage.

(2) The certificate, in addition to setting forth the date of the marriage and the names, ages, and residences of the parties at the time the marriage ceremony was performed between them and that he performed the marriage ceremony between them, shall also set forth in what capacity the person granting the certificate acted, whether as a judge, justice of the peace, minister, priest, or otherwise, at the time of the solemnization of the marriage, and that the original certificate of the marriage was made out by him and duly filed in the office of the clerk and recorder for the county, as required by law.

(3) The person so receiving the certificate may, within ninety (90) days after procuring the certificate from the person who solemnized the marriage, file the certificate in the office of the clerk and recorder of the

county, whose duty it shall be to record the certificate in his record of marriage certificates.

(4) The certificate shall relate back and have full force and effect from the date of the solemnization of such marriage.

(b)(1) In case the person who solemnized the marriage has died or resides beyond the limits of this state so that the certificate cannot be obtained, then the parties between whom the marriage was originally solemnized, or the one surviving if either be dead, or their heirs, by their guardian, in case both the parties are dead, wishing to reinstate the record of the marriage may file their petition in the office of the clerk of the county court setting forth therein the substance of the original marriage certificate or the time when and the person by whom the marriage was performed, in what capacity the person acted, whether as judge, justice of the peace, minister, or priest, and that the certificate, with the record thereof, was lost, destroyed, or burned.

(2) Upon hearing the petition, if the county court is advised of the truth of the matters contained in the petition, it shall decree that the marriage record be reinstated upon the records of the recorder's office, and the clerk of the court shall certify a copy of the petition and decree down to the recorder, who shall record them.

(3) The marriage record shall relate back and have the same force and effect from the time when the marriage ceremony was first performed as though the original record had never been lost, destroyed, or burned.

(4) No such decree shall be made or rendered by the court unless:

(A) The petition has been filed in the office of the clerk of the court, verified by the affidavit of the petitioner or some other reputable person for him, her, or them; and

(B) The petitioner has caused a notice of the intended application to be published in some newspaper printed in the county at least six (6) weeks before filing the petition with the county court calling on all persons who might feel themselves concerned to file notice with the county court as to why the record should not be reinstated upon the records of the recorder of the county. If no newspaper is printed in the county at the time of the publication, then the publication may be made in some newspaper printed in the City of Little Rock, Arkansas.

History. Acts 1855, § 4, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8347, 8348; Pope's Dig., §§ 10938, 10943, 10944; A.S.A. 1947, §§ 16-406, 16-411, 16-412; Acts 1997, No. 1044, § 1.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

16-119-108. Restoration of record of married person's schedule of property.

(a)(1) In all cases in which any married woman availed herself of the provisions of §§ 9-11-501 and 9-11-509 — 9-11-514 and has filed in the office of the recorder of the county a schedule of the property to which she is entitled under the provisions of §§ 9-11-501 and 9-11-509 —

9-11-514, and the schedule has been lost, destroyed, or burned, the married woman may file in the office of the clerk of the circuit court of the county, her petition addressed to the circuit court , setting forth a full description of the nature of the property and the manner in which she derived title to the property, and setting forth that a schedule of the property, under the provisions of §§ 9-11-501 and 9-11-509 — 9-11-514, has been filed in the office of the recorder for the county.

(2) The petition shall state, as nearly as possible, the time when the schedule was filed and pray that the schedule may be reinstated and admitted of record in the recorder's office of the county. The petition shall be verified by the affidavit of the petitioner or some other disinterested reputable person for her.

(b) The court, being sufficiently advised of the truth of the matters set forth in the petition, shall grant the prayer of the petition and shall direct a copy of the petition and decree of the court, granting the prayer thereof, to be certified by the clerk of the court under seal. The petition and decree shall be recorded in the recorder's office of the county and shall relate back to and have full force and effect from the date of the filing of the original schedule of the property for record.

(c) No such decree shall be rendered by the court unless the applicant has previously given public notice of the intended application, addressed to all whom it might concern, by publication for two (2) consecutive weeks in some newspaper published in the county or, if none is published therein, then in some newspaper printed in Little Rock, Arkansas, for at least six (6) consecutive weeks before the commencement of the term of court at which the application is to be made.

History. Acts 1855, § 5, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8349; Pope's Dig., §§ 10938, 10945; A.S.A. 1947, §§ 16-407, 16-411, 16-412; Acts 2003, No. 1185, § 248.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

Amendments. The 2003 amendment redesignated former (a) as present (a)(1); in (a)(1), deleted "by her next friend" following "married woman," "in chancery" following "circuit court of the county" and substituted "circuit court" for "judge of the court sitting in chancery"; and added (a)(2).

16-119-109. Restoration of bonds of executors, administrators, or guardians.

(a) In all cases relating to executorships, administrations, and guardianships in which the bonds of the executors, administrators, or guardians were lost, destroyed, or burned, it shall be the duty of the circuit court of the county to require all the executors, administrators, or guardians who have not already done so to file in the court a report in which they shall set forth, as far as possible, their proceedings in their executorships, administrations, or guardianships, the amount and conditions of their bonds originally given, and the names of their securities.

(b) After the filing of the report, the court shall immediately order the clerk to issue citations against all the securities named in the report as having been signers of the executor's, administrator's, or guardian's bond, which citations shall command the securities to appear before the court on or before the date specified therein and show cause why the bonds so reported should not be established and reinstated upon the records of the court with like effect as the original bond.

(c) At the return term of the citation, the court shall proceed to hear the allegations and proofs of the parties in case opposition is made to the reinstating of the bond, and shall determine the same as the right thereof shall appear.

(d) If no opposition is made or if the finding of the court shall be against the obligors in the bond, then the court shall order that the copy set forth in the report be reinstated as the original bond, and the copy of the bond shall be recorded by the clerk in the book kept by the clerk in his or her office for that purpose, with a copy of the order reinstating the bond.

(e) No such order shall be entered in any case unless the securities have had thirty (30) days' notice before the commencement of the term of the court at which the citation is returnable.

(f) Any executor, administrator, or guardian who fails to make any report as specified in this section, when required to do so by order of the probate court of the county, within thirty (30) days after the making and entering of the order, and being notified of the order, shall incur the same pains and penalties that are prescribed by law for failure to make any settlement required by existing laws. The court, at the next succeeding term after such a failure, shall revoke his, her, or their letters, and the executor's, administrator's, or guardian's powers shall thenceforth cease.

History. Acts 1855, § 6, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8350; Pope's Dig., §§ 10938, 10946; A.S.A. 1947, §§ 16-408, 16-411, 16-412; Acts 2003, No. 1185, § 249.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

Amendments. The 2003 amendment substituted "circuit court" for "judge of the court of probate" in (a); and, in (b), substituted "the court on or before the date specified therein" for "the court of probate on or before the second day of the next succeeding term of the court after the issuance of the citations" and deleted "if any they can" following "show cause."

16-119-110. Certified copies of restored record admissible as evidence.

A duly certified copy of the record of any instrument, order, judgment, or decree made by virtue of this chapter shall be received in evidence in any of the courts of this state, without any further proof thereof, and shall be prima facie evidence of the loss, destruction, or burning of the original upon which the record, order, judgment, or decree is based, and of the contents thereof.

History. Acts 1855, § 8, p. 113; 1857, §§ 1, 2, p. 81; C. & M. Dig., §§ 8342, 8352; Pope's Dig., §§ 10938, 10948; A.S.A. 1947, §§ 16-410 — 16-412.

Publisher's Notes. As to applicability of Acts 1855, p. 113, see Publisher's Notes to § 16-119-101.

CASE NOTES

Analysis

Allowance of claims.
Matters not part of record.
Power of court.
Substitution of pleadings.

Allowance of Claims.

A petition to restore a lost record of a claim against a county and of its allowance by the county court was not dismissible on the ground that the claim was then barred if it was not barred when allowed, since when restored it related back to the original allowance. McDaniel v. Prairie County, 187 Ark. 38, 58 S.W.2d 200 (1933).

The right to have the record of a claim against the county and its allowance by the court restored could not be defeated on the ground that the original claim was not properly verified. McDaniel v. Prairie County, 187 Ark. 38, 58 S.W.2d 200 (1933).

Where a claim against the county was duly allowed and no appeal therefrom was taken, on a petition to restore the claim and its allowance, it was no defense that the claim should not have been allowed under the Ark. Const., Amend. 10 prohibiting allowances in excess of the revenues of the current fiscal year. McDaniel v. Prairie County, 187 Ark. 38, 58 S.W.2d 200 (1933).

Matters Not Part of Record.

Where at the trial parties agreed that oral testimony be taken in shorthand by court stenographer, to be transcribed only upon request of appealing party, in the event of an appeal, and the notes were burned when the courthouse was destroyed by fire, chancellor's refusal to supply and restore the evidence was held not error, since notes were not a part of the court record, having not been filed, and appellants were not diligent in prosecuting their appeal. Stewart v. Hulett, 196 Ark. 403, 117 S.W.2d 1067 (1938).

Power of Court.

This section does not take away the inherent power of the court to restore its lost records. Fort Smith Auto. & Supply Co. v. Nedry, 100 Ark. 485, 140 S.W. 711 (1911).

Both at common law and under this section, the chancery court has authority to supply a lost deposition for use on appeal. Chicago Title & Trust Co. v. Hagler Special Sch. Dist. No. 27, 178 Ark. 443, 12 S.W.2d 881 (1928).

Substitution of Pleadings.

The substitution of pleadings on motion without notice is not error in the absence of any contention that they were incorrect or that appellant was prejudiced thereby. Spadra Creek Coal Co. v. Eureka Anthracite Coal Co., 104 Ark. 359, 148 S.W. 644 (1912).

16-119-111. Record books unfit for preservation — Transcriptions to take place of originals.

(a) The county courts of the various counties of the state are authorized to have transcribed into well-bound books, suitable for that purpose, provided by the courts, all records contained in books that, in the opinion of the county courts, are in a condition unfit for preservation.

(b) The transcript, after being submitted to the county court, examined, compared, and adopted, shall take the place of and be regarded as the original record and, as such, shall be deposited with other records in the office of the county court.

History. Acts 1868, No. 54, §§ 1, 2, p. 199; C. & M. Dig., §§ 8353, 8354; Pope's Dig., §§ 10949, 10950; A.S.A. 1947, §§ 16-401, 16-402.

CHAPTER 120

IMMUNITY FROM TORT LIABILITY

SUBCHAPTER.
1. General Provisions.
2. Equine Activities.
3. Injuries Suffered While Committing a Felony.
4. Emergency Medical Treatment.

A.C.R.C. Notes. References to "this chapter" in subchapter 1 may not apply to subchapters 2-4 which were enacted subsequently.

Publisher's Notes. Acts 1987, No. 970, § 6, provided that this act shall only apply to suits for recovery of damages based upon causes of action that accrue after Aug. 1, 1987.

Cross References. Liability of state and local governments, § 21-9-201 et seq.

Immunity from liability for volunteer services by retired physicians and surgeons, § 17-95-108.

RESEARCH REFERENCES

UALR L.J. Survey — Torts, 10 UALR L.J. 609.

Subchapter 1 — General Provisions

SECTION.
16-120-101. Legislative determination.
16-120-102. Persons granted immunity.
16-120-103. Exceptions to immunity grant.
16-120-104. Transfer of assets to avoid claims.
16-120-105. Donors of firefighting equipment not liable — Exception.

16-120-101. Legislative determination.

The General Assembly has determined that nonprofit corporations serve important functions in providing services and assistance to persons in the state and that, in order for these nonprofit corporations to function effectively, persons serving on the board of directors should not be subject to vicarious liability for the negligence of corporate employees or other directors. The General Assembly has further determined that potential exposure to vicarious liability has a detrimental effect on the participation of persons as directors of nonprofit corporations and that providing immunity to directors of those corporations for certain types of liability will be in the best interest of the state and that the same immunity should be extended to members of governing bodies of governmental entities.

History. Acts 1987, No. 970, § 1.

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Tort Law, 25 UALR L.J. 1041.

CASE NOTES

Cited: King v. Little Rock Sch. Dist., 301 Ark. 148, 782 S.W.2d 574 (1990).

16-120-102. Persons granted immunity.

(a) Except as otherwise provided by this chapter, no member of any board, commission, agency, authority, or other governing body of any governmental entity and no member of the board of directors of a nonprofit corporation that holds a valid federal income tax exemption issued by the Internal Revenue Service shall be held personally liable for damages resulting from:

(1) Any negligent act or omission of an employee of the nonprofit corporation or governmental entity; or

(2) Any negligent act or omission of another director or member of the governing body of the governmental entity.

(b) The same immunity provided by this chapter shall be extended to any athletic official during the officiating of an interscholastic, intercollegiate, or any other amateur athletic contest being conducted under the auspices of a nonprofit or governmental entity. No official shall be held personally liable in any civil action for damages to a player, participant, or spectator as a result of his acts of commission or omission arising out of officiating duties and activities. Nothing in this subsection shall be deemed to grant immunity to any person causing damage by his malicious, willful, wanton, or grossly negligent act.

History. Acts 1987, No. 970, §§ 2, 3.

CASE NOTES

Cited: Conway Corp. v. Construction Eng'rs, Inc., 300 Ark. 225, 782 S.W.2d 36 (1989); King v. Little Rock Sch. Dist., 301 Ark. 148, 782 S.W.2d 574 (1990); West Memphis Sch. Dist. No. 4 v. Circuit Court, 316 Ark. 290, 871 S.W.2d 368 (1994).

16-120-103. Exceptions to immunity grant.

(a) The immunity provided by this chapter shall not extend to acts or omissions of directors of nonprofit corporations or members of boards, commissions, agencies, authorities, or other governing bodies of any governmental entity which constitute ordinary or gross negligence personal to the director or member or to intentional torts committed by a director or member.

(b) The immunity provided by this chapter shall not extend to acts or omissions of directors of nonprofit corporations which are licensed or

permitted by the Arkansas Alcoholic Beverage Control to dispense alcoholic beverages, beer, or wine.

(c) Nothing in this chapter shall be construed to limit the liability of a nonprofit corporate entity itself for damages resulting from any negligent act or omission of an employee of the nonprofit corporation.

History. Acts 1987, No. 970, §§ 4, 7.

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Tort Law, 25 UALR L.J. 1041.

CASE NOTES

Analysis

Nonprofit corporations.
School board members.

Nonprofit Corporations.

Supreme Court of Arkansas declined to overrule *Clayborn*, which held that a nonprofit organization could be sued and found liable, but the prevailing party in the lawsuit against the nonprofit could not execute on the property or assets of the nonprofit in order to satisfy any judgment, and the direct action statute only allowed a suit against the nonprofit's insurer if the nonprofit was immune from suit, not just immune for judgment. Scamardo v. Jaggers, 356 Ark. 236, 149 S.W.3d 311 (2004).

School Board Members.

Immunity will not extend to intentional torts committed by school board members. Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (1992).

16-120-104. Transfer of assets to avoid claims.

If a nonprofit corporation transfers assets to a member of the board of directors of the corporation or to another nonprofit corporation in order to avoid claims against corporate assets resulting from a judgment rendered as a result of a suit to recover damages for the negligence of the corporation, a corporate employee or a director, the director to whom the asset is transferred, or any director of the corporation from which assets are transferred to avoid those claims may be held personally liable for any judgment rendered. The immunity provided by this chapter shall be of no force or effect.

History. Acts 1987, No. 970, § 5.

16-120-105. Donors of firefighting equipment not liable — Exception.

(a) As used in this section:

(1) "Donor department" means any fire department in Arkansas, including a:

(A) Fire department for a suburban improvement district or a subordinate service district of a county;

(B) Fire protection district;

(C) Municipal fire department; or

(D) Volunteer fire department; and

(2) "Firefighting equipment" means any personal property owned by a donor department that is used for firefighting services or training, emergency medical services, or rescue services.

(b) The provisions of this section shall govern the good faith donations of firefighting equipment that is:

(1) Not sold for its full fair market value;

(2) Declared surplus equipment as no longer needed for the donor department's use; or

(3) Completely depreciated in book value as a property item in the donor department's inventory.

(c) All other provisions of law notwithstanding, a good faith donor of firefighting equipment that is serviceable and fit for use at the time it is donated to a bona fide charitable or not-for-profit organization for free distribution or redistribution at a nominal cost to other fire departments or is donated directly to another fire department shall not be subject to criminal or civil liability arising from an injury or death due to the condition of the firefighting equipment, except as provided under § 21-9-301.

History. Acts 2003, No. 1075, § 1.

Cross References. Tort liability of political subdivisions — Immunity declared, § 21-9-301.

Subchapter 2 — Equine Activities

SECTION.

16-120-201. Definitions.
16-120-202. Liability.

A.C.R.C. Notes. References to "this chapter" in subchapter 1 may not apply to this subchapter which was enacted subsequently.

Publisher's Notes. Acts 1991, No. 103, § 3, provided: "This Act shall not apply to causes of action based upon conduct occurring prior to July 15, 1991."

16-120-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Equine" means a horse, pony, mule, donkey, or hinny;

(2) "Equine activity" means:

(A) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting;

(B) Equine training and teaching activities;

(C) Boarding equines;

(D) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is

permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine; and

(E) Rides, hunts, or other equine activities of any type, however informal or impromptu;

(3) "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether nonprofit or operating for profit, which sponsors, organizes, or provides facilities for an equine activity; and

(4) "Participant" means any person, whether amateur or professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

History. Acts 1991, No. 103, § 1; 1995, No. 353, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Centner, Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors, 50 Ark. L. Rev. 637.

16-120-202. Liability.

(a)(1) Except as provided in subdivision (a)(2) of this section, an equine activity sponsor or an employee of an equine activity sponsor shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities.

(2) Nothing in subdivision (a)(1) of this section shall prevent or limit the liability of an equine activity sponsor or an employee of an equine activity sponsor who:

(A)(i) Provided the equipment or tack and knew or should have known that the equipment or tack was faulty, and that such equipment or tack was faulty to the extent that it did cause injury;

(ii) Provided the equine animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or to determine the ability of the participant to engage safely in the equine activity and to safely manage the particular equine based on the participant's representation of his ability;

(B) Owned, leased, rented, or otherwise was in lawful possession and control of the land or facilities upon which the participant sustained injury because of a dangerous latent condition which was known or should have been known to the equine activity sponsor or to an employee of the sponsor and for which warning signs had not been conspicuously posted;

(C) Committed an act or omission that constituted willful or wanton disregard for the safety of the participant, and that act or omission caused the injury;

(D) Intentionally injured the participant.

(3) Nothing in subdivision (a)(1) of this section shall prevent or limit the liability of an equine activity sponsor or an employee thereof under liability provisions as set forth in products liability laws.

(b)(1) Every equine activity sponsor shall post and maintain signs which contain the warning notice specified in subdivision (b)(2) of this section. Such signs shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine activity sponsor conducts equine activities. The warning notice specified in subdivision (b)(2) of this section shall appear on the sign in black letters, with each letter to be a minimum of one inch (1″) in height.

(2) The signs described in subdivision (b)(1) of this section shall contain the following warning notice:

WARNING

Under Arkansas law, an equine activity sponsor is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risk of equine activities.

(c) Provided, the immunity provided for in this section is not applicable with respect to thoroughbred horse racing as authorized and regulated in § 23-110-101 et seq.

History. Acts 1991, No. 103, § 2; 1995, No. 353, §§ 1, 2.

RESEARCH REFERENCES

Ark. L. Rev. Centner, Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors, 50 Ark. L. Rev. 637.

Subchapter 3 — Injuries Suffered While Committing a Felony

SECTION.
16-120-301. Liability.

A.C.R.C. Notes. References to "this chapter" in subchapter 1 may not apply to this subchapter which was enacted subsequently.

16-120-301. Liability.

If a person while committing a felony is injured or his or her property damaged, the person who causes such injury or damage shall not be liable for damages nor subject to suit for the injury or damage. Provided, that:

(1) The person causing such injury or damage has not acted with malice;

(2) The person committing the felony has not clearly retreated from the felonious activity;

(3) The person causing such injury or damage has not prearranged a trap that would automatically inflict injury or damage to any person entering a certain location; and

(4) The act causing the injury or damage was the result of or in response to the commission of the felony.

History. Acts 1993, No. 588, § 1.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Criminal Law, 16 UALR L.J. 91.

Subchapter 4 — Emergency Medical Treatment

SECTION.
16-120-401. Exemption for requested assistance.

A.C.R.C. Notes. References to "this chapter" in subchapter 1 may not apply to this subchapter which was enacted subsequently.

Cross References. Good Samaritan law, § 17-95-101.

Effective Dates. Acts 1993, No. 1191, § 5: Apr. 16, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that a "Good Samaritan" law should be enacted to encourage persons and entities to provide their specialized equipment and personnel to respond to accidents and emergencies; that this act so provides; and that this act should go into effect immediately. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

16-120-401. Exemption for requested assistance.

Any person or entity who, at the request of any city, county, or state agency, supplies specialized equipment or personnel in response to an emergency shall not be liable for any civil damages for good faith acts or omissions, provided that the services or equipment was provided without compensation and at the place of the emergency.

History. Acts 1993, No. 1191, § 1.

CHAPTER 121

UTILITIES TAMPERING

SECTION.
16-121-101. Definitions.
16-121-102. Presumptions.
16-121-103. Civil cause of action.
16-121-104. Statute of limitations.

Effective Dates. Acts 1989, No. 595, § 7: Mar. 15, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that utility suppliers are presently inadequately protected from theft of their utility services by utility customers who tamper with metering devices or who otherwise divert utility services; that the utility suppliers have no cause of action for this theft; and that this Act is immediately necessary to provide such a cause of action. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

16-121-101. Definitions.

As used in this subchapter:

(1) "Divert" means to change the intended course or path of gas, water, or electricity without the authorization or consent of the utility supplier;

(2) "Meter tampering" means:

(A) Removing metering devices;

(B) Connecting wires or other instruments to bypass a meter recording usage for billing;

(C) Breaking or defacing any seal, locking device, or other part that makes up the metering device;

(D) Preventing or retarding the action of a meter or other instrument used for measuring utility service;

(E) Transferring from one location to another a metering device;

(F) Using a metering device belonging to the utility supplier that has not been assigned to the utility customer's location and has not been installed by the utility supplier; and

(G) Any other means of tampering with or bypassing a metering device that deprives a supplier from receiving proper charges or payment for utility service;

(3) "Person" means an individual, a corporation, firm, company, or association;

(4) "Unauthorized reconnection" means the commencement of gas, water, or electric service, other than by the supplier, to a utility customer or any other person after utility service has been discontinued by the supplier;

(5) "Utility customer" means:

(A) The person or persons occupying the premises and receiving the benefits of utility service from a utility supplier, whether or not that person is listed on the records of the utility supplier as the customer liable for charges or payment for utility service received with or without charge; or

(B) The manager, superintendent, officer, or other responsible official of a corporation, partnership, proprietorship, association, or other business organization that has received utility service with or without proper charge; and

(6) "Utility supplier or supplier" means any regulated public or private utility authorized to provide electricity, natural gas, or water for sale to utility customers in any particular service area.

History. Acts 1989, No. 595, § 1.

16-121-102. Presumptions.

(a) The receipt of benefits because of meter tampering or unauthorized reconnection of utility services by a utility customer without incurring proper charges therefor shall be evidence creating presumption of an intent to defraud or deprive a utility supplier from receiving proper charge or payment for such utility service.

(b) The presence upon property served by a utility supplier of a metering device altered to improperly monitor the amount of utility service used on or by such property shall be evidence creating a presumption that the utility customer has diverted or obtained utility service with the intent to deprive or defraud a supplier from receiving proper charges or payment for such utility service.

History. Acts 1989, No. 595, § 2.

16-121-103. Civil cause of action.

(a) Any utility supplier damaged through meter tampering or other acts by any person; including any acts which divert, or cause to be diverted, any utility service by any means whatsoever; or which make, or cause to be made, any unauthorized reconnection with property owned or used by the supplier to provide utility services without the authorization or consent of the supplier, shall have a cause of action against any such person found in violation of this section in the circuit courts of this state for all damages resulting therefrom, including actual, consequential, and punitive damages.

(b) Such supplier shall be entitled to no less than three (3) times the amount of damages and shall also be entitled to reasonable attorneys' fees.

(c) The cause of action created by this section exists regardless of any criminal charge against a utility customer for defrauding or depriving a supplier of proper charges or payment for utility service or damaged metering devices.

History. Acts 1989, No. 595, § 3.

16-121-104. Statute of limitations.

Civil actions pursuant to the provisions of this chapter shall be commenced within two (2) years following the date of discovery of the violation.

History. Acts 1989, No. 595, § 4.

CHAPTER 122

CIVIL LIABILITY OF PERSONS CAUGHT SHOPLIFTING

SECTION.
16-122-101. Liability of adult, employee, and parent.
16-122-102. Written demand required — Amount of damages.
16-122-103. Penalty.

16-122-101. Liability of adult, employee, and parent.

(a) An adult or emancipated minor who takes possession of any goods, wares, or merchandise displayed or offered for sale by any wholesale or retail store or other mercantile establishment without the consent of the owner or seller, and with the intention of converting such goods, wares, or merchandise to his own use without having paid the purchase price thereof, shall be subject to civil damages and penalties as set forth in § 16-122-102.

(b) An employee who takes possession of any cash, goods, wares, or merchandise without the consent of the owner or seller, and with the intent of converting such cash, goods, wares, or merchandise to his own use without having paid the purchase price thereof, shall be subject to civil damages and penalties as set forth in § 16-122-102 in addition to the actual amount of any cash not returned or recovered.

(c)(1) The parent or legal guardian having custody of an unemancipated minor under the age of eighteen (18) and over the age of six (6) who takes possession of any goods, wares, or merchandise displayed or offered for sale by any wholesale or retail store or other mercantile establishment without the consent of the owner or seller, and with the intent of converting such goods, wares, or merchandise to his own use without having paid the purchase price thereof, shall be subject to civil damages and penalties as set forth in § 16-122-102; provided, that for the purpose of this subsection liability shall not be imposed upon any government entity or private agency which has been assigned any responsibility for the minor child pursuant to court order or action of the Department of Human Services.

(2) However, no parent or legal guardian shall be civilly liable under the provisions of this subsection for any offense committed by an unemancipated minor under the age of eighteen (18) and over the age of six (6) who has not been in his or her physical custody for the thirty (30) days preceding the offense.

History. Acts 1993, No. 936, §§ 1-3.

Cross References. Shoplifting, § 5-36-116.

16-122-102. Written demand required — Amount of damages.

(a) Under the provisions of this subchapter, the owner or seller shall issue a written demand letter by certified mail for the return of the merchandise or, only if the merchandise has not been returned or recovered, its retail cash equivalent, and a penalty in the amount of two hundred dollars ($200) for an adult or emancipated minor, or one hundred dollars ($100) for an unemancipated minor, to the last known address of the adult, emancipated minor, employee, or parent or legal guardian of the unemancipated minor in question.

(b) If the individual to whom the written demand is sent complies with the terms of the demand letter within thirty (30) days of the receipt of the letter, that individual shall not be subject to further civil liability with respect to that specific act of retail theft.

(c)(1) If the individual to whom the written demand is sent does not comply within thirty (30) days of the receipt of a demand letter, then the owner or seller may bring an action against the individual for the recovery of civil damages and penalties in any court of competent jurisdiction if the total damages do not exceed the jurisdictional limit of that court.

(2) In an action brought under this subsection, the owner or seller may recover the following:

(A)(i) Civil damages in an amount equal to the retail value of the merchandise if the merchandise is not recovered or returned; or

(ii) If the merchandise is recovered or returned, civil damages in an amount equal to the difference between the market value of the recovered or returned merchandise and the retail value of the recovered or returned merchandise; and

(B) A civil penalty of:

(i) Up to one thousand dollars ($1,000) for an adult or emancipated minor; and

(ii) Up to five hundred dollars ($500) for an unemancipated minor; plus

(C) Court costs; and

(D) A reasonable attorney's fee.

History. Acts 1993, No. 936, § 4; 2003, No. 1185, § 250.

Amendments. The 2003 amendment, in (c)(1), deleted "including the small claims division of municipal court" following "competent jurisdiction."

CASE NOTES

Constitutionality.

The trial court ruled that this section was unconstitutional and ordered a store to return $100 paid by the appellant's father; where neither party appealed the finding that this section was unconstitutional, that was the law of the case, and the appellant could not be subjected to the civil penalty imposed by this section. K.S. v. State, 343 Ark. 59, 31 S.W.3d 849 (2000).

16-122-103. Penalty.

A conviction for violation of § 5-36-103 shall not be a condition precedent to maintenance of a civil action authorized by this subchapter and nothing in this subchapter shall prohibit or limit any other course of action a retailer or merchant may have against a person who unlawfully takes cash, goods, wares, or merchandise from the merchant's premises.

History. Acts 1993, No. 936, § 5.
Cross References. Shoplifting, § 5-36-116

CHAPTER 123
CIVIL RIGHTS

SUBCHAPTER.
1. The Arkansas Civil Rights Act of 1993.
2. Fair Housing.
3. Arkansas Fair Housing Commission.

Subchapter 1 — The Arkansas Civil Rights Act of 1993

SECTION.
16-123-101. Title.
16-123-102. Definitions.
16-123-103. Applicability.
16-123-104. Construction.
16-123-105. Civil rights offenses.
16-123-106. Hate offenses.
16-123-107. Discrimination offenses.
16-123-108. Retaliation — Interference — Remedies.

A.C.R.C. Notes. The codification scheme of this subchapter was restructured in 1994 by the Arkansas Code Revision Commission.

RESEARCH REFERENCES

ALR. Attorney's fees in civil rights actions. 43 ALR Fed. 243.

Ark. L. Notes. Richards, The Arkansas Civil Rights Act: Sometimes the Only Remedy for Employment Discrimination, 1996 Ark. L. Notes 87.

Ark. L. Rev. Green, Mixed Motives and After-Acquired Evidence: Second Cousins Benefit From 20/20 Hindsight, 49 Ark. L. Rev. 211.

Note, McKennon v. Nashville Banner Publishing Co.: The Masquerading Doctor, the "Greatest Treason," and After-Acquired Evidence in Employment Discrimination Suits, 49 Ark. L. Rev. 625.

Beiner, An Overview of the Arkansas Civil Rights Act of 1993, 50 Ark. L. Rev. 165.

UALR L.J. Legislative Survey, Civil Liberties, 16 UALR L.J. 73.

Oliver, The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law, 16 UALR L.J. 327.

Note, Constitutional Law — First Amendment and Freedom of Speech — Public Employers Must Conduct a Reasonable Investigation to Determine if an Employee's Speech is Protected Before Discharging the Employee Based Upon the Speech. Waters v. Churchill, 114 S. Ct. 1878 (1994), 18 UALR L.J. 463.

CASE NOTES

Cited: Citizens to Establish a Reform Party v. Priest, 325 Ark. 257, 926 S.W.2d 432 (1996); Malone v. Trans-States Lines, 325 Ark. 383, 926 S.W.2d 659 (1996); Foster v. Jefferson County Bd. of Elec. Comm'rs, 328 Ark. 223, 944 S.W.2d 93 (1997).

16-123-101. Title.

This subchapter shall be referred to as the "Arkansas Civil Rights Act of 1993".

History. Acts 1993, No. 962, § 1.

A.C.R.C. Notes. This section was unaffected by the 1994 restructuring of this subchapter's codification scheme.

CASE NOTES

In General.

Mayor was entitled to summary judgment on police chief's claim under the Arkansas Civil Rights Act of 1993, § 16-123-101et seq., because the mayor was entitled to qualified immunity; the mayor could not have reasonably known that his termination of the police chief's employment, which was done upon the discovery of missing or incomplete police reports 15 days after the police chief made a statement at a city council meeting, would violate the police chief's constitutional right to free speech under Ark. Const. art. 2, § 6. Smith v. Brt, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 434 (June 30, 2005).

Cited: Ford v. Arkansas Game & Fish Comm'n, 335 Ark. 245, 979 S.W.2d 897 (1998); Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101 (E.D. Ark. 2000); Hudson v. Norris, 227 F.3d 1047 (8th Cir. 2000).

16-123-102. Definitions.

For the purposes of this subchapter:

(1) "Because of gender" means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions;

(2) "Compensatory damages" means damages for mental anguish, loss of dignity, and other intangible injuries, but "compensatory damages" does not include punitive damages;

(3) "Disability" means a physical or mental impairment that substantially limits a major life function, but "disability" does not include:

(A) Compulsive gambling, kleptomania, or pyromania;

(B) Current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs; or

(C) Alcoholism;

(4) "Employee" does not include:

(A) Any individual employed by his or her parents, spouse, or child;

(B) An individual participating in a specialized employment training program conducted by a nonprofit sheltered workshop or rehabilitation facility; or

(C) An individual employed outside the State of Arkansas;

(5) "Employer" means a person who employs nine (9) or more employees in the State of Arkansas in each of twenty (20) or more calendar weeks in the current or preceding calendar year, or any agent of such person;

(6) "National origin" includes ancestry;

(7) "Place of public resort, accommodation, assemblage, or amusement" means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, but "place of public resort, accommodation, assemblage, or amusement" does not include:

(A) Any lodging establishment which contains not more than five (5) rooms for rent and which is actually occupied by the proprietor of such establishment as a residence; or

(B) Any private club or other establishment not in fact open to the public; and

(8) "Religion" means all aspects of religious belief, observance, and practice.

History. Acts 1993, No. 962, § 9; 1995, No. 480, § 1.

A.C.R.C. Notes. This section was unaffected by the 1994 restructuring of this subchapter's codification scheme.

CASE NOTES

Analysis

Disability.
Employer.

Disability.

Whether police officer's impairment due to obesity and hypertension qualified as a disability as defined by subdivision (3) of this section was a question of fact. Morrow v. City of Jacksonville, 941 F. Supp. 816 (E.D. Ark. 1996).

A food allergy does not constitute a disability within the meaning of the statute. Land v. Baptist Med. Ctr., 164 F.3d 423 (8th Cir. 1999).

"Disability," as defined in the Arkansas Civil Rights Act, § 16-123-101 et seq., does not extend a cause of action for violation of civil rights to an individual who is regarded as having a disability. Faulkner v. Arkansas Children's Hosp., 347 Ark. 941, 69 S.W.3d 393 (2002).

Employers were granted summary judgment on former employee's disability discrimination claim where the employee admitted that he had learned to shave, brush his teeth, groom himself, prepare meals and wash dishes with his left hand and, as a result, while he had some medically imposed restrictions, the employee had not met his burden of showing that the extent of his limitations due to his impairment were substantial in terms of caring for himself. Didier v. Schwan Food Co., 387 F. Supp. 2d 987 (W.D. Ark. 2005).

Employer.

Police officer's claims for discrimination brought against the city and the chief of police dismissed as to the chief of police because the chief, as her supervisor, did not fit the definition of "employer" in subdivision (5) of this section, and because the rights allegedly violated were not covered by the Arkansas Constitution and thus § 16-123-105 was not implicated. Morrow v. City of Jacksonville, 941 F. Supp. 816 (E.D. Ark. 1996).

16-123-103. Applicability.

(a) The provisions of this subchapter relating to employment shall not be applicable with respect to employment by a religious corporation, association, society, or other religious entity.

(b) It shall not constitute employment discrimination under this subchapter for an employer to refuse to accommodate the religious observance or practice of an employee or prospective employee if the employer demonstrates that he is unable to reasonably make such accommodation without undue hardship on the conduct of the employer's business.

(c) A defendant may avoid liability under this subchapter by showing that his or her actions were based on legitimate, nondiscriminatory factors and not on unjustified reasons.

(d) Provided the conduct at issue is based on a bona fide business judgment and is not a pretext for prohibited discrimination, nothing in this subchapter shall be construed to prohibit or restrict:

(1) An insurer, hospital, medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or any bank, savings and loan, or other lender from underwriting insurance or lending risks or administering such risks that are based on or are not inconsistent with federal or state law;

(2) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or are not inconsistent with federal or state law; or

(3) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that is not subject to federal or state laws that regulate insurance.

(e) This subchapter shall not apply to matters regulated by the Arkansas Insurance Code or the Trade Practices Act of the Arkansas Insurance Code, § 23-66-201 et seq.

History. Acts 1993, No. 962, §§ 6, 8.

A.C.R.C. Notes. Prior to the 1994 restructuring of the codification scheme of this subchapter, this section was codified as § 16-123-108, under the heading of "Applicability."

Cross References. As to the Arkansas Insurance Code, see note following § 23-60-101.

RESEARCH REFERENCES

UALR L.J. Annual Survey of Caselaw, Civil Rights, 26 UALR L.J. 841.

CASE NOTES

Analysis

Sexual harassment.
Termination from employment.

Sexual Harassment.

Trial court erred in granting summary judgment against claims of sexual harassment in violation of § 16-123-107(a) of the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., and for wrongful termination in violation of the public policy of the State of Arkansas, where there were genuine issues of fact as to whether an at-will female employee was terminated from her job in retaliation for resisting the sexual advances of her employer or because the employee's position was going to be given to the employer's son; a lack of termination, or a non-gender-based reason for the employee's termination, does not extinguish a harassed employee's cause of action for sexual harassment under the Arkansas Civil Rights Act of 1993. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).

Claims of sexual harassment premised under the Arkansas Civil Rights Act of 1993, § 16-123-101, et seq., are analyzed in the same manner as claims brought under 42 U.S.C.S. § 2000e-2(a)(1) of the Civil Rights Act of 1964. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).

Termination from Employment.

Where an employee has alleged two separate injuries, one being a work-related physical injury and disability, for which she has received workers' compensation benefits, and one being a subsequent nonphysical injury arising from employer's action in terminating her based upon her new disability, the first injury is exclusively cognizable under the Workers' Compensation Act (see § 11-9-105), while the subsequent injury is of the type envisioned by this subchapter. Davis v. Dillmeier Enters., Inc., 330 Ark. 545, 956 S.W.2d 155 (1997).

16-123-104. Construction.

Nothing in this subchapter shall be construed to waive the sovereign immunity of the State of Arkansas.

History. Acts 1993, No. 962, § 7.

A.C.R.C. Notes. Prior to the 1994 restructuring of the codification scheme of this subchapter, this section was codified as § 16-123-109, under the heading of "Sovereign immunity."

16-123-105. Civil rights offenses.

(a) Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.

(b) In the discretion of the court, a party held liable under this section shall also pay the injured party's cost of litigation and a reasonable attorney's fee in an amount to be fixed by the court.

(c) When construing this section, a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only.

History. Acts 1993, No. 962, § 2; 1995, No. 480, § 2; 2003, No. 1185, § 251.

A.C.R.C. Notes. Prior to the 1994 restructuring of the codification scheme of this subchapter, this section was codified as § 16-123-103, under the heading of "Civil liability."

Amendments. The 2003 amendment, in (a), substituted "in circuit court for legal and equitable relief" for "at law, a suit in equity" and deleted "proceeding for" preceding "redress."

RESEARCH REFERENCES

ALR. What constitutes substantial limitation on major life activity of working for purposes of state civil rights acts. 102 ALR 5th 1.

Ark. L. Rev. Recent Developments in Tort Law (Sheperd v. Washington County), 51 Ark. L. Rev. 219.

UALR L.J. Miller, Arkansas Civil Rights Act-School District's Liability for Peer Abuse: Arkansas Supreme Court Holds School Districts Have No Duty to Protect Students From Each Other. Rudd v. Pulaski County Special School District, 341 Ark. 794, 20 S.W.3d 310 (2000), 23 UALR L.R. 977 (Summer, 2001).

Annual Survey of Caselaw, Civil Rights, 26 UALR L.J. 841.

CASE NOTES

Analysis

In general.
Claim dismissed.
Claim not dismissed.
Sexual harassment.
Special relationship.
State actors.

In General.

This section is the portion of the chapter dealing with deprivation of a right secured by the Arkansas Constitution at the hands of governmental employers or employers acting under color of state authority, and as such is a sort of state version of 42 U.S.C. § 1983. Smith v. Foote's Dixie Dandy, Inc., 941 F. Supp. 807 (E.D. Ark. 1995).

By enacting § 16-123-105(a), the General Assembly did not intend to repeal § 19-10-305(a), as repeal by implication is not favored and the two sections can be read in harmony. Robinson v. Langdon, 333 Ark. 662, 970 S.W.2d 292 (1998).

The court uses the same principles to analyze a claim for disability discrimination under the Arkansas Civil Rights Act, § 16-123-101 et seq., as it would to analyze a claim under the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq. Duty v. Norton-Alcoa Proppants, 293 F.3d 481 (8th Cir. 2002).

Claims of sexual harassment premised under the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101, et seq., are analyzed in the same manner as claims brought under 42 U.S.C.S. § 2000e-2(a)(1) of the Civil Rights Act of 1964. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).

Attorneys' fees imposed on a debtor as part of a civil rights action against him were dischargeable in bankruptcy where the Arkansas civil rights statute that the debtor allegedly violated did not require both willful and malicious conduct to impose liability, and both willfulness and malice were required to except a debt pursuant to 11 U.S.C.S. § 523(a)(6). Jarrett v. Jarrett (In re Jarrett), 303 B.R. 816 (Bankr. E.D. Ark. 2003).

Inmate who asserted wool blankets caused him to suffer rashes did not show a serious medical need that would have supported a claim of a violation of Ark. Const. Art. 2, § 9 or this section; the inmate's condition was not one that mandated treatment even though it may have been diagnosed by a doctor and, while the evidence showed he indeed suffered from discomfort and rashes, he had been provided with adequate treatment for those symptoms. Williams v. Ark. Dep't of Corr., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 247 (Apr. 28, 2005).

Claim Dismissed.

Police officer's claims for discrimination brought against the city and the chief of police dismissed as to the chief of police

because the chief, as her supervisor, did not fit the definition of "employer" in 16-123-102(5), and because the rights allegedly violated were not covered by the Arkansas Constitution and thus this section was not implicated. Morrow v. City of Jacksonville, 941 F. Supp. 816 (E.D. Ark. 1996).

The circuit court properly granted summary judgment regarding the appellants' claim that the appellee had violated a right guaranteed to them by this subchapter, as the appellants had no civil right to be free from a lawsuit filed against them based on probable cause. Carmical v. McAfee, 68 Ark. App. 313, 7 S.W.3d 350 (1999).

Claim Not Dismissed.

Plaintiff's complaint not dismissed even though she cited to the wrong section of this chapter, where the plaintiff's allegations were specific and the complaint stated that plaintiff was asserting a claim parallel to the federal claim, and thus the defendant had actual notice of her claim. Smith v. Foote's Dixie Dandy, Inc., 941 F. Supp. 807 (E.D. Ark. 1995).

Plaintiff's complaint sufficiently stated a civil-rights claim under this section and Ark. Const. Art. 2, § 8, where the facts alleged in the complaint demonstrated that defendants' actions in taking this particular violent inmate to a private medical clinic without taking necessary precautions to protect any potential victims at the clinic from being harmed by the inmate resulted in the plaintiff's injuries and her husband's death. Shepherd v. Washington County, 331 Ark. 480, 962 S.W.2d 779 (1998).

Sexual Harassment.

Trial court erred in granting summary judgment against claims of sexual harassment in violation of § 16-123-107(a) of the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., and for wrongful termination in violation of the public policy of the State of Arkansas, where there were genuine issues of fact as to whether an at-will female employee was terminated from her job in retaliation for resisting the sexual advances of her employer or because the employee's position was going to be given to the employer's son; a lack of termination, or a non-gender-based reason for the employee's termination, does not extinguish a harassed employee's cause of action for sexual harassment under the Arkansas Civil Rights Act of 1993. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).

Special Relationship.

A school did not have a special relationship with a student who was fatally shot on a school bus, thereby imposing a duty upon the school to protect him from violent acts by the other student who shot him. Rudd v. Pulaski County Special Sch. Dist., 341 Ark. 794, 20 S.W.3d 310 (2000).

State Actors.

Bail bondsman was not a state actor when he filed an affidavit requesting a plaintiff's arrest under § 16-94-213, and therefore was entitled to a judgment as a matter of law on claim that he deprived plaintiff of his civil rights. Dean v. Olibas, 129 F.3d 1001 (8th Cir. 1997).

A high school student who fatally shot another student on a school bus was not a state actor, and the school district's failure to impose and maintain restraints upon him did not trigger the provisions of the Civil Rights Act. Rudd v. Pulaski County Special Sch. Dist., 341 Ark. 794, 20 S.W.3d 310 (2000); Casteel v. Clear Channel Broad., Inc., 254 F. Supp. 2d 1081 (W.D. Ark. 2003).

Cited: Hudson v. Norris, 227 F.3d 1047 (8th Cir. 2000); Casteel v. Clear Channel Broad., Inc., 254 F. Supp. 2d 1081 (W.D. Ark. 2003); Crockett v. Counseling Servs. of E. Ark., Inc., 85 Ark. App. 371, 154 S.W.3d 278 (2004).

16-123-106. Hate offenses.

(a) An action for injunctive relief or civil damages, or both, shall lie for any person who is subjected to acts of:

(1) Intimidation or harassment; or

(2) Violence directed against his person; or

(3) Vandalism directed against his real or personal property,

where such acts are motivated by racial, religious, or ethnic animosity.

(b) Any aggrieved party who initiates and prevails in an action authorized by this section shall be entitled to damages, including punitive damages, and in the discretion of the court to an award of the cost of the litigation, and a reasonable attorney's fee in an amount to be fixed by the court.

(c) This section shall not apply to speech or conduct protected by the First Amendment of the United States Constitution or Article 2, § 6, of the Arkansas Constitution.

History. Acts 1993, No. 962, § 3.

A.C.R.C. Notes. Prior to the 1994 restructuring of the codification scheme of this subchapter, this section was codified as § 16-123-104, under the heading of "Plaintiffs."

16-123-107. Discrimination offenses.

(a) The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(1) The right to obtain and hold employment without discrimination;

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(3) The right to engage in property transactions without discrimination;

(4) The right to engage in credit and other contractual transactions without discrimination; and

(5) The right to vote and participate fully in the political process.

(b) Any person who is injured by an intentional act of discrimination in violation of subdivisions (a)(2)-(5) of this section shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover compensatory and punitive damages, and, in the discretion of the court, to recover the cost of litigation and a reasonable attorney's fee.

(c)(1)(A) Any individual who is injured by employment discrimination by an employer in violation of subdivision (a)(1) of this section shall have a civil action in a court of competent jurisdiction, which may issue an order prohibiting the discriminatory practices and provide affirmative relief from the effects of the practices, and award back pay, interest on back pay, and, in the discretion of the court, the cost of litigation and a reasonable attorney's fee.

(B) No liability for back pay shall accrue from a date more than two (2) years prior to the filing of an action.

(2)(A) In addition to the remedies under subdivision (c)(1)(A) of this section, any individual who is injured by intentional discrimination by an employer in violation of subdivision (a)(1) of this section shall be entitled to recover compensatory damages and punitive damages. The total compensatory and punitive damages awarded under this subdivision (c)(2)(A) shall not exceed:

(i) The sum of fifteen thousand dollars ($15,000) in the case of an employer who employs fewer than fifteen (15) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

(ii) The sum of fifty thousand dollars ($50,000) in the case of an employer who employs more than fourteen (14) and fewer than one hundred one (101) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

(iii) The sum of one hundred thousand dollars ($100,000) in the case of an employer who employs more than one hundred (100) and fewer than two hundred one (201) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year;

(iv) The sum of two hundred thousand dollars ($200,000) in the case of an employer who employs more than two hundred (200) and fewer than five hundred one (501) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year; and

(v) The sum of three hundred thousand dollars ($300,000) in the case of an employer who employs more than five hundred (500) employees in each of twenty (20) or more calendar weeks in the current or preceding calendar year.

(3) Any action based on employment discrimination in violation of subdivision (a)(1) of this section shall be brought within one (1) year after the alleged employment discrimination occurred, or within ninety (90) days of receipt of a "Right to Sue" letter or a notice of "Determination" from the United States Equal Employment Opportunity Commission concerning the alleged unlawful employment practice, whichever is later.

History. Acts 1993, No. 962, §§ 4, 5; 1995, No. 480, § 3.

A.C.R.C. Notes. Prior to the 1994 restructuring of the codification scheme of this subchapter, subsection (a) of this section was codified as § 16-123-105, under the heading of "Rights"; subsection (b) of this section was codified as § 16-123-106, under the heading of "Remedies for intentional discrimination"; and subsection (c) of this section was codified as § 16-123-107, under the heading of "Remedies for employment discrimination."

RESEARCH REFERENCES

ALR. Discrimination against pregnant employee as violation of state fair employment laws. 99 ALR 5th 1.

What constitutes substantial limitation on major life activity of working for purposes of state civil rights acts. 102 ALR 5th 1.

Pursuit of nonjudicial remedy for employment discrimination as amounting to election against judicial remedy. 103 ALR 5th 557.

Necessity of, and what constitutes, employer's reasonable accommodation of employee's religious preference under state law. 107 ALR 5th 623.

UALR L.J. Annual Survey of Caselaw, Civil Rights, 26 UALR L.J. 841.

CASE NOTES

Analysis

In general.
Claim dismissed.
Claim not dismissed.
Damages.
Disability discrimination.
Evidence.
Gender discrimination.
Sexual harassment.
Statute of limitations.
Venue.

In General.

Claims of sexual harassment premised under the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101, et seq., are analyzed in the same manner as claims brought under 42 U.S.C.S. § 2000e-2(a)(1) of the Civil Rights Act of 1964. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).

Attorneys' fees imposed on a debtor as part of a civil rights action against him were dischargeable in bankruptcy where the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., that the debtor allegedly violated did not require both willful and malicious conduct to impose liability, and both willfulness and malice were required to except a debt pursuant to 11 U.S.C.S. § 523(a)(6). Jarrett v. Jarrett (In re Jarrett), 303 B.R. 816 (Bankr. E.D. Ark. 2003).

Plaintiff's claims brought under 42 U.S.C.S. § 1981 were governed by the four-year statute of limitations set forth in 28 U.S.C.S. § 1658, rather than the one-year statute of limitations set forth in the Arkansas Civil Rights Act, specifically subdivision (c)(3) of this section; accordingly, the district court improperly granted summary judgment with respect to such claims. Jackson v. Homechoice, Inc., 368 F.3d 997 (8th Cir. 2004).

After employee received unemployment benefits based on a finding of no work-related misconduct, collateral estoppel did not bar the employer from asserting, in a racial discrimination case, that the employee was fired for inappropriate behavior; an administrative finding that the employee was discharged for reasons that did not disqualify him for unemployment benefits under § 11-10-514(a)(1) did not address the issue of whether an improper racial motive was present within the meaning of subdivision (a)(1) of this section and, absent evidence of racial animus, summary judgment for the employer was proper. Crockett v. Counseling Servs. of E. Ark., Inc., 85 Ark. App. 371, 154 S.W.3d 278 (2004).

Claim Dismissed.

No civil rights violation where the employer articulated legitimate nondiscriminatory reasons for terminating employee and employee failed to produce any evidence that these reasons were pretextual. Winkle v. Southwestern Bell Tel. Co., 195 F.3d 418 (8th Cir. 1999).

The trial court properly granted summary judgment to the defendant employer on the gender discrimination claims of two employees where one employee failed to adduce sufficient evidence of pretext and offered no evidence from which a jury could reasonably infer that gender considerations motivated the employer's actions in selecting other more favorably evaluated candidates over her for a promotion, and the other employee advanced no additional evidence to support an inference that, with regard to her, the selection process was anything but fair and impartial. Gentry v. Georgia-Pacific Corp., 250 F.3d 646 (8th Cir. 2001).

Claim Not Dismissed.

Plaintiff's complaint not dismissed even though she cited to the wrong section of this chapter, where the plaintiff's allegations were specific and the complaint stated that plaintiff was asserting a claim parallel to the federal claim, and thus the defendant had actual notice of her claim. Smith v. Foote's Dixie Dandy, Inc., 941 F. Supp. 807 (E.D. Ark. 1995).

Damages.

An award of punitive damages was proper where the court also awarded compensatory damages under alternative theories of breach of contract and retaliation in violation of the Civil Rights Act. Odom Antennas, Inc. v. Stevens, 61 Ark. App. 182, 966 S.W.2d 279 (1998).

Disability Discrimination.

Where an employee has alleged two separate injuries, one being a work-related physical injury and disability, for

which she has received workers' compensation benefits, and one being a subsequent nonphysical injury arising from employer's action in terminating her based upon her new disability, the first injury is exclusively cognizable under the Workers' Compensation Act (see § 11-9-105), while the subsequent injury is of the type envisioned by this subchapter. Davis v. Dillmeier Enters., Inc., 330 Ark. 545, 956 S.W.2d 155 (1997).

There is no remedy under § 11-9-101 et seq. for an employee who is terminated from his or her job on the basis of the work-related disability after the end of the rehabilitation and compensation period; thus, the exclusive-remedy provision of § 11-9-101 et seq. does not preclude an employee from bringing an action under this subchapter based upon employer's alleged discrimination in terminating her on the basis of her permanent restrictions and impairments. Davis v. Dillmeier Enters., Inc., 330 Ark. 545, 956 S.W.2d 155 (1997).

The plaintiff established a statutory violation where a county courthouse did not have an elevator, ramp, or other device making the second floor accessible to anyone with disabilities involving mobility, the public entrance doors to the courtroom were not wide enough for a wheelchair to pass through, and the restrooms on the second floor were not accessible to wheelchair bound individuals. Matthews v. Jefferson, 29 F. Supp. 2d 525 (W.D. Ark. 1998).

There was sufficient evidence for the jury to reasonably conclude that the employee was discriminated against because of a disability when the employee offered evidence of a disability that limited the employee's ability to perform a life activity, and that the employee was able to do the employee's job with an accommodation, but the employer refused to let the employee return to work. Duty v. Norton-Alcoa Proppants, 293 F.3d 481 (8th Cir. 2002).

Evidence.

In an employee's action claiming racial harassment and a racially motivated termination in violation of 42 U.S.C.S. § 2000e-2 of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and § 16-123-107 of the Arkansas Civil Rights Act, § 16-123-101 et seq., the district court did not err in admitting evidence of racist remarks and threatening actions in the workplace of which the employee was not aware; the evidence was relevant under Fed. R. Evid. 401 and 402 because the evidence of the extent of the hostile environment was probative on the matter of managerial motives and on the employee's eligibility for punitive damages. Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004).

Gender Discrimination.

A supervisor's statement that he was directed to terminate an employee because of her pregnancy established a prima facie case of discrimination. Rice v. Golf Enters., Inc. (In re McElhanon), 207 Bankr. 188 (Bankr. E.D. Ark. 1997).

The trial court properly granted summary judgment to the defendant bank in an action alleging gender discrimination where (1) the plaintiff made out a prima facie case, but (2) the bank cited its low profitability and the need to reduce operating costs, especially in personnel, as a legitimate, nondiscriminatory factor for discharging the plaintiff, as well as refusing to create or re-fill three additional positions at the bank, and (3) the plaintiff failed to meet her burden to present facts which if proven at trial would permit a jury to conclude that the bank's proffered reason was pretextual and that its actual reason was discriminatory. Flentje v. First Nat'l Bank, 340 Ark. 563, 11 S.W.3d 531 (2000).

Four elements are necessary to establish a prima facie case of gender discrimination based on pregnancy; the party must show (1) that she is within the protected class; (2) that she met applicable job qualifications; (3) that her employment was terminated; and (4) that there is some "additional showing" that pregnancy was a factor in her termination. Flentje v. First Nat'l Bank, 340 Ark. 563, 11 S.W.3d 531 (2000).

This section is not restricted in application only to getting a job and being free from discriminatory discharge; this section also creates a right to be paid for that employment without discrimination on the basis of gender. Broadus v. O.K. Indus., Inc., 226 F.3d 937 (8th Cir. 2000).

Sexual Harassment.

Trial court erred in granting summary judgment against claims of sexual harass-

ment in violation of § 16-123-107(a) of the Arkansas Civil Rights Act of 1993, § 16-123-101 et seq., and for wrongful termination in violation of the public policy of the State of Arkansas, where there were genuine issues of fact as to whether an at-will female employee was terminated from her job in retaliation for resisting the sexual advances of her employer or because the employee's position was going to be given to the employer's son; a lack of termination, or a non-gender-based reason for the employee's termination, does not extinguish a harassed employee's cause of action for sexual harassment under the Arkansas Civil Rights Act of 1993. Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W.3d 671 (2003).

Statute of Limitations.

One-year limitation period of the Arkansas Civil Rights Act is inconsistent with 42 U.S.C.S. § 1981's interest in providing relief to victims of racial discrimination; thus, former employee's claim of race discrimination under 42 U.S.C.S. § 1981 was governed by three-year statute of limitations applicable to personal injury actions, § 16-56-105, not the one-year statute of limitations contained in subdivision (c)(3) of this section. Thompson v. Wal-Mart Stores, Inc., 314 F. Supp. 2d 842 (W.D. Ark. 2004).

Venue.

Prior to the 2001 passage of Ark. Const. Amend. 80, § 19(b)(1) merging chancery and circuit courts, once judgment was entered in the circuit court, the employee was barred by res judicata from transferring the case to chancery court for imposition of further equitable remedies unavailable in the circuit court. Clark v. Farmers Exch., Inc., 347 Ark. 81, 61 S.W.3d 140 (2001).

Cited: Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101 (E.D. Ark. 2000); Crone v. UPS, 301 F.3d 942 (8th Cir. 2002).

16-123-108. Retaliation — Interference — Remedies.

(a) Retaliation. No person shall discriminate against any individual because such individual in good faith has opposed any act or practice made unlawful by this subchapter or because such individual in good faith made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Interference, Coercion, or Intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this subchapter.

(c) Remedies and Procedures. The remedies and procedures available in § 16-123-107(b) shall be available to aggrieved persons for violations of subsections (a) and (b) of this section.

History. Acts 1995, No. 480, § 4.

CASE NOTES

Cited: Wallace v. Sparks Health Sys., 415 F.3d 853 (8th Cir. 2005).

Smith v. Brt, — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 434 (June 30, 2005).

Subchapter 2 — Fair Housing

SECTION.
16-123-201. Short title.
16-123-202. Definitions.
16-123-203. Legislative declaration.
16-123-204. Conduct prohibited in real

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estate transactions — Exception.
16-123-205. Conduct in real estate financing prohibited — Exception.
16-123-206. Contractual provisions.
16-123-207. Representations prohibited.
16-123-208. Retaliation.
16-123-209. Violation.
16-123-210. Civil remedy.

16-123-201. Short title.

This subchapter shall be known and may be cited as the "Arkansas Fair Housing Act".

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-202. Definitions.

As used in this subchapter:

(1) "Housing accommodation" includes improved or unimproved real property, or a part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one (1) or more persons;

(2) "Real estate broker or salesman" means a person, whether licensed or not, who:

(A) For or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property;

(B) Negotiates or attempts to negotiate any of those activities;

(C) Holds himself out as engaged in those activities;

(D) Negotiates or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon real property;

(E) Is engaged in the business of listing real property in a publication; or

(F) Is a person employed by or acting on behalf of a real estate broker or salesman;

(3) "Real estate transaction" means the sale, exchange, rental, or lease of real property, or an interest therein; and

(4) "Real property" includes a building, structure, mobile home, real estate, land, mobile home park, trailer park, tenement, leasehold, or an interest in a real estate cooperative or condominium.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-203. Legislative declaration.

(a) The opportunity to obtain housing and other real estate without discrimination because of religion, race, color, national origin, sex, disability, or familial status as prohibited by this chapter, is recognized and declared to be a civil right.

(b) Provided, the provisions of § 16-123-301 et seq. shall become effective after the statutes and regulations required by this subchapter are adopted as substantially equivalent to federal fair housing laws, as

recognized by the appropriate federal agency designated to enforce the provisions of federal fair housing laws.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1; 2001, No. 1785, § 1.
Amendments. The 2001 amendment redesignated the former section as present (a); and added (b).

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

16-123-204. Conduct prohibited in real estate transactions — Exception.

(a) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of religion, race, color, national origin, sex, disability, or familial status of a person or a person residing with that person:

(1) Refuse to engage in a real estate transaction with a person;

(2) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(3) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction;

(4) Refuse to negotiate for a real estate transaction with a person;

(5) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or knowingly fail to bring a property listing to a person's attention, or refuse to permit a person to inspect real property;

(6) Make, print, or publish or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin or an intention to make any such preference, limitation, or discrimination; or

(7) Offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith.

(b) This section shall not apply to:

(1) The rental of a housing accommodation in a building which contains housing accommodations for not more than two (2) families living independently of each other if the owner or a member of the owner's immediate family resides in one (1) of the housing accommodations, or to the rental of a room or rooms in a single family dwelling by a person if the lessor or a member of the lessor's immediate family resides therein; or

(2) The rental of a housing accommodation for not more than twelve (12) months by the owner or lessor where it was occupied by him and

maintained as his home for at least three (3) months immediately preceding occupancy by the tenant and is temporarily vacated while maintaining legal residence.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-205. Conduct in real estate financing prohibited — Exception.

(a) A person to whom application is made for financial assistance or financing in connection with a real estate transaction or in connection with the construction, rehabilitation, repair, maintenance, or improvement of real property, or a representative of that person, shall not:

(1) Discriminate against the applicant because of the religion, race, color, national origin, sex, disability, or familial status of the applicant or a person residing with the applicant; or

(2) Use a form of application for financial assistance or financing to make or keep a record or inquiry in connection with an application for financial assistance or financing which indicates, directly or indirectly, a preference, limitation, specification, or discrimination as to the religion, race, color, national origin, sex, disability, or familial status of the applicant or a person residing with the applicant.

(b) Subdivision (a)(2) of this section shall not apply to a form of application for financial assistance prescribed for the use of a lender regulated as a mortgagee under the National Housing Act, as amended, being 12 U.S.C. §§ 1701-1750g (Supp. 1973), or by a regulatory board or officer acting under the statutory authority of this state or the United States.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-206. Contractual provisions.

(a) A condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of religion, race, color, national origin, sex, disability, or familial status is void, except this section shall not prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted because of race, color, sex, disability, familial status, or national origin.

(b) A person shall not insert in a written instrument relating to real property a provision that is void under this section or honor such a provision in the chain of title.

(c) A person shall not threaten, intimidate, or interfere with persons in the enjoyment of their dwelling because of the race, color, national origin, sex, or familial status of such persons, or of visitors or associates of such persons.

(d) A person shall not discharge, threaten, coerce, intimidate, or take any other adverse action against an employee, broker, agent, or other person because he or she refused to take part in a discriminatory housing practice or because he or she has aided or encouraged any other person in the exercise or enjoyment of any right granted under the provisions of this subchapter.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-207. Representations prohibited.

A person shall not represent, for the purpose of inducing a real estate transaction from which the person may benefit financially, that a change has occurred or will or may occur in the composition, with respect to religion, race, color, national origin, sex, disability, or familial status of the owners or occupants, in the block, neighborhood, or area in which the real property is located or represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which in the real property is located.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-208. Retaliation.

Two (2) or more persons shall not conspire to, or a person shall not:

(1) Retaliate or discriminate against a person because the person has opposed a violation of this subchapter, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this subchapter;

(2) Attempt, directly or indirectly, to commit an act prohibited by this subchapter;

(3) Willfully interfere, obstruct, or prevent a person from complying with this subchapter or an order issued or rule promulgated under this subchapter; or

(4) Discharge, threaten, coerce, intimidate, or take any other adverse action against an employee, broker, agent, or other person because he or she refused to take part in a discriminatory housing practice or because he or she has aided or encouraged any other person in the exercise or enjoyment of any right granted under the provisions of this subchapter.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-209. Violation.

A person shall not violate the terms of an order to an adjustment order made under this subchapter.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

16-123-210. Civil remedy.

(a)(1) A person alleging a violation of this subchapter may bring a civil action for appropriate injunctive relief or damages, or both.

(2) As used in subdivision (a)(1) of this section, "damages" means damages for injury or loss caused by each violation of this subchapter, including reasonable attorney's fees.

(b) An action commenced pursuant to subsection (a) of this section may be brought in the circuit court for:

(1) The county where the alleged violation occurred; or

(2) The county where the person against whom the civil complaint is filed resides or has his principal place of business.

(c) In a civil action under this subchapter, the court in its discretion may allow the prevailing party reasonable attorney's fees and costs.

(d) A court rendering a judgment in an action brought pursuant to this subchapter may award all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

History. Acts 1995, No. 1129, § 1; 1995, No. 1327, § 1.

Subchapter 3 — Arkansas Fair Housing Commission

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16-123-348. Violations — Bodily injury — Penalties.

Effective Dates. Acts 2003, No. 1011, § 6: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 2003 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 2003 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 2003."

Acts 2003, No. 1775, § 13: Apr. 22, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the provisions of this act are designed to comply with the federal Fair Housing Law, and to make the state eligible for federal funds; that until this act becomes law those federal funds will not be available to the State of Arkansas; and therefore, this act should go into effect as soon as possible. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

16-123-301. Finding.

The General Assembly recognizes:

(1) That the right to seek housing underlies the general public's ability to secure health, safety, and welfare; and

(2) Seeks with this subchapter to protect the public's access to fair housing.

History. Acts 2001, No. 1785, § 2.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2001 Arkansas General Assembly, Practice, Procedure, and Courts, 24 UALR L.J. 523.

16-123-302. Definitions.

(1) "Aggrieved person" means a person who:

(A) Claims to have been injured by a discriminatory housing practice; or

(B) Believes that a person will be injured by a discriminatory housing practice that is about to occur;

(2) "Complainant" means a person, including the director acting on behalf of the Arkansas Fair Housing Commission, § 16-123-303, who files a complaint under this subchapter;

(3) "Commission" means the Arkansas Fair Housing Commission, § 16-123-303;

(4) "Conciliation" means the process for resolving issues raised by a complaint or by the investigation of a complaint through informal negotiations involving the aggrieved person, the respondent, and the director on behalf of the commission;

(5) "Conciliation agreement" means a written agreement setting forth the resolution of the issues raised in conciliation;

(6) "Director" means the Director of the Arkansas Fair Housing Commission created in § 16-123-303;

(7)(A) "Disability" throughout this subchapter shall be interpreted identically to the term "handicap" within federal laws, regulations, cases, directives, and administrative rulings and positions on subject matter similar to the purposes of this subchapter and means a person:

(i) With a physical or mental impairment which substantially limits one (1) or more of the person's major life activities;

(ii) With a record of having an impairment which substantially limits one (1) or more of the person's major life activities; or

(iii) Regarded as having an impairment which substantially limits one (1) or more of a person's major life activities.

(B) "Disability" does not include current, illegal use of or addiction to a controlled substance, as defined in the Section 102 of the Controlled Substances Act, 21 U.S.C. § 802, as in effect January 1, 2001;

(8) "Discriminatory housing practice" means an act that is prohibited under §§ 16-23-310 — 16-123-316 and § 16-23-344;

(9) "Dwelling" means any building, structure, or portion thereof, which is occupied as, or designed or intended for occupancy as, a residence by one (1) or more families and any vacant land which is offered for sale or lease for the construction or location thereon of any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one (1) or more families;

(10) "Family" includes a single individual;

(11) "Familial status" means:

(A) The status resulting from one (1) or more individuals who are under eighteen (18) years of age being domiciled with:

(i) The parent or another person having legal custody of the individual under the age of eighteen (18) years; or

(ii) The designee of the parent or other person having custody, with the written permission of the parent or other person; or

(B) The status resulting from being in the process of securing legal custody of any individual who is under the age of eighteen (18) years; or

(C) The status resulting from being pregnant;

(12) "Person" includes individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, bankruptcy trustees, receivers, and fiduciaries;

(13) "Prevailing party" has the same meaning as the term has in Section 722 of the Revised Statutes of the United States, 42 U.S.C. § 1988;

(14) "Respondent" means:

(A) The person or other entity accused in a complaint or an unfair housing practice; and

(B) Any other person notified as required with respect to respondents under § 16-123-317(f); and

(15) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

History. Acts 2001, No. 1785, § 3.

Publisher's Notes. As enacted in 2001, subdivision (7)(B) provided: "'Disability' does not include current, illegal use of or addiction to a controlled substance, as defined in the Section 102 of the Controlled Substances Act, 21 U.S.C. § 802 as in effect January 1, 2001."

As amended in 2001, subdivision (13) provided: "'Prevailing party' has the same meaning as the term has in Section 722 of the Revised Statutes of the United States, 42 U.S.C. § 1988 as in effect January 1, 2001."

16-123-303. Creation — Members.

(a) There is created the Arkansas Fair Housing Commission.

(b)(1) The commission shall consist of thirteen (13) voting members, to be selected as follows: Seven (7) appointed by the Governor, three (3) appointed by the Speaker of the House of Representatives and three (3) appointed by the President Pro Tempore of the Senate, as set forth in this subchapter, for terms of four (4) years whose terms begin on January 1 and end on December 31 of the fourth year or when their respective successors are appointed and qualified.

(2)(A)(i) One (1) member shall have been a licensed real estate broker or licensed real estate salesperson engaged in the practice of residential real estate sales for not fewer than five (5) years prior to his or her nomination.

(ii) One (1) member shall have been a licensed real estate broker or licensed real estate salesperson engaged in the practice of multifamily real estate property management for no fewer than five (5) years prior to his or her nomination.

(iii) One (1) member shall have been a licensed real estate broker or licensed real estate salesperson engaged in the practice of real estate for no fewer than five (5) years prior to his or her nomination.

(B) The Governor shall appoint members to fill vacancies for the two (2) members to represent subdivisions (b)(2)(A)(i) and (ii) of this section from a list of four (4) nominees submitted by the Arkansas Realtors Association and a member to fill a vacancy for the one (1) member to represent subdivision (b)(2)(A)(iii) of this section not involving nominees from the Arkansas Realtors Association.

(3)(A) One (1) member shall have been a licensed homebuilder engaged in the homebuilding business for not fewer than five (5) years.

(B) The Governor shall appoint a member to fill a vacancy for the member to represent subdivision (b)(3)(A) of this section from a list of four (4) nominees submitted by the Arkansas Homebuilders Association.

(4)(A) One (1) member shall have been a mortgage broker employed for not fewer than five (5) years by a registered mortgage loan company or loan broker.

(B) The Governor shall appoint a member to fill a vacancy for the member to represent subdivision (b)(4)(A) of this section from a list of four (4) nominees submitted by the Arkansas Mortgage Bankers Association.

(5)(A) One (1) member shall have been a banker engaged in the banking business for not fewer than five (5) years.

(B) The Governor shall appoint a member to fill a vacancy for the member to represent subdivision (b)(5)(A) of this section from a list of four (4) nominees jointly submitted by the Arkansas Community Bankers and the Arkansas Bankers Association.

(6)(A)(i) Seven (7) members shall represent consumers and shall not be actively engaged in or retired from the business of real estate, homebuilding, mortgage lending or banking, including one (1) member who shall be appointed by the Governor to represent persons meeting the definition of "disabled" in this subchapter from a list of four (4) nominees submitted by the Governor's Commission on People with Disabilities.

(ii) Three (3) of the members to be appointed pursuant to subdivision (b)(6)(A)(i) of this section shall be appointed by the Speaker of the House of Representatives, one (1) member who shall be a fair housing attorney or advocate with at least five (5) years of experience in advocacy for fair housing issues.

(iii) Three (3) of the members to be appointed pursuant to subdivision (b)(6)(A)(i) of this section shall be appointed by the President Pro Tempore of the Senate, one (1) member of whom shall be sixty (60) years of age or older who shall represent the elderly.

(B) A minimum of four (4) appointments made pursuant to subdivision (b)(6)(A)(i) of this section shall be given to persons protected under §§ 16-123-310 — 16-123-316.

(c) All members shall be full voting members of the commission.

(d)(1) Members of the commission appointed by the Governor shall at all times include one (1) member from each Arkansas congressional district.

(2) Members appointed by the President Pro Tempore of the Senate shall be chosen from Arkansas congressional districts rotating in order, with the initial commissioners being chosen from districts one (1) and two (2).

(3) Members appointed by the Speaker of the House of Representatives shall be chosen from congressional districts rotating in order with the initial members being chosen from districts three (3) and four (4).

(e) The commission shall elect a chair from its membership.

(f) The commission shall meet at least one (1) time each month.

(g)(1) The members of the commission shall serve four-year terms, except that the initial appointees shall serve staggered terms determined by a procedure established by the commission so that six (6) serve a two-year term and seven (7) serve a four-year term.

(2) No member may serve more than two (2) four-year terms.

(h) Each commissioner may receive expense reimbursement and stipends in accordance with § 25-16-905.

History. Acts 2001, No. 1785, § 4.

A.C.R.C. Notes. As amended in 2001, subdivision (b)(1) provided: "The commission shall consist of thirteen (13) voting members, to be selected as follows: Seven (7) appointed by the Governor, three (3) appointed by the Speaker of the House of Representatives and three (3) appointed by the President Pro Tempore of the Senate, as set forth in this subchapter, for terms of four (4) years[,except for the initial commissioners, whose terms shall be determined as set forth in § 16-123-303(f),] whose terms begin on January 1 and end on December 31 of the fourth year or when their respective successors are appointed and qualified."

16-123-304. Powers and duties.

(a) The Arkansas Fair Housing Commission shall adopt rules necessary to implement this subchapter substantially equivalent to those provided in federal fair housing laws and regulations.

(b) The commission shall receive, initiate, investigate, seek to conciliate, and, if conciliation fails, seek to resolve complaints alleging violations of this subchapter through the procedures described by this subchapter.

(c) The commission, at least annually, shall make a written report to the Legislative Council based upon and detailing the past year's activities and operations, including policy and program recommendations.

(d) The commission shall cooperate with and, as appropriate, may provide technical and other assistance to federal, state, local, and other public or private entities that are formulating or operating programs to prevent or eliminate discriminatory housing practices.

(e) The commission shall have the power to issue subpoenas and subpoenas duces tecum in connection with both its investigations and hearings.

(f) A witness summoned by a subpoena under this subchapter shall be entitled to a witness fee payable in the same amount as set forth in rules of procedure for civil proceedings.

History. Acts 2001, No. 1785, § 5; 2003, No. 1775, § 1.

Amendments. The 2003 amendment deleted (f)(2) and made related changes.

RESEARCH REFERENCES

UALR L.J. Survey of Legislation, 2003 Arkansas General Assembly, Practice, Procedure, and Courts, Unfair Housing Practices, 26 UALR L.J. 448.

16-123-305. Director.

(a) The Arkansas Fair Housing Commission may employ a Director of the Arkansas Fair Housing Commission and fix compensation, duties, authority, and responsibilities.

(b) The commission may authorize the director to hire necessary staff and to provide for services, furnishings, equipment, and office space.

History. Acts 2001, No. 1785, § 6.

16-123-306. Exemptions — Certain sales and rentals.

(a) Sections 16-123-310 and 16-123-312 — 16-123-314 do not apply to a single-family house sold or rented by an owner or rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four (4) families living independently of each other if the owner actually maintains and occupies one (1) of the living quarters as his or her residence and if:

(1) The private individual owner does not own more than three (3) single-family houses at any one (1) time;

(2) In the case of the sale of a single-family house by a private individual owner not residing in the house at the time of the sale, or who was not the most recent resident of the house prior to the sale, the exemption granted by this section shall apply only with respect to one (1) sale within any twenty-four-month period;

(3) A bona fide private individual owner does not own any interest in, nor is there owned or reserved on the owner's behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of more than three (3) single-family houses at any one (1) time; and

(4)(A) The house is sold or rented:

(i) Without the services of any real estate broker, agent, or salesman; and

(ii) Without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of § 16-123-311.

(B) However, nothing in this subdivision (a)(4) shall prohibit the use of attorneys, escrow agents, abstracters, title companies, and other professional assistance as necessary to perfect or transfer the title.

(b) For the purposes of subsection (a) of this section, a person shall be deemed to be in the business of selling or renting dwellings if:

(1) The person, within the preceding twelve (12) months, has participated as principal in three (3) or more transactions involving the sale or rental of any dwelling or any interest therein; or

(2) The person, within the preceding twelve (12) months, has participated as agent, other than in the sale of his or her own personal residence, in providing sales or rental facilities or sales or rental services in two (2) or more transactions involving the sale or rental of any dwelling or any interest therein; or

(3) The person is the owner of any dwelling designed or intended for occupancy by, or occupied by, five (5) or more families.

History. Acts 2001, No. 1785, § 7.

16-123-307. Exemptions — Religious organizations, private clubs, and others.

(a) This subchapter does not prohibit a religious organization, association, or society or a nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society from:

(1) Limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin; or

(2) Giving preference for those dwellings to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(b) This subchapter does not prohibit a private club not in fact open to the public that, as an incident to its primary purpose, provides lodging that it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of that lodging to its members or from giving preference to its members.

(c)(1) Nothing in this subchapter limits the applicability of any reasonable local or state restriction regarding the maximum number of occupants permitted to occupy a dwelling.

(2) Nothing in this subchapter shall prohibit a person from refusing to rent a dwelling by reason of reasonable occupancy standards established by the owner or the owner's agent that apply to persons of all ages, and that have been adopted and published before the event in issue.

(3) An occupancy limitation of two (2) persons per bedroom residing in a dwelling unit shall be presumed reasonable in this state or any political subdivision of this state.

(4) Nothing in this subchapter regarding familial status shall apply to housing for older persons.

(d)(1) As used in this section, "housing for older persons" means housing:

(A) Provided under any state program that the Director of the Arkansas Fair Housing Commission determines is specifically de-

signed and operated to assist elderly persons, as defined in any state program, or provided under any federal program that the Secretary of the United States Department of Housing and Urban Development determines is specifically designed and operated to assist elderly persons, as defined in any federal program;

(B) Intended for, and solely occupied by, persons sixty-two (62) years of age or older; or

(C) Intended and operated for occupancy by persons fifty-five (55) years of age or older, and:

(i) At least eighty percent (80%) of the occupied units are occupied by at least one (1) person who is fifty-five (55) years of age or older;

(ii) The housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subdivision (d)(1); and

(iii) The housing facility or community complies with rules issued by the director for verification of occupancy, which shall:

(*a*) Provide for verification by reliable surveys and affidavits; and

(*b*) Include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of this subdivision (d)(1)(C)(iii).

(2) The surveys and affidavits authorized under subdivision (d)(1)(C)(iii) of this section shall be admissible in administrative and judicial proceedings for the purposes of verification.

(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

(A) Persons residing in the housing as of August 13, 2001, who do not meet the age requirements of subdivisions (d)(1)(B) or (C) of this section, if:

(i) New occupants of the housing meet the age requirements of subdivisions (d)(1)(B) or (C) of this section; or

(ii) The units are unoccupied units and are reserved for occupancy by persons who meet the age requirements of subdivisions (d)(1)(B) or (C) of this section.

(4)(A) A person shall not be held personally liable for monetary damages for a violation of this subchapter if the person reasonably relied in good faith on the application of the exemption under this section relating to housing for older persons.

(B) For the purposes of this subchapter, "good faith reliance" means:

(i) The person has no actual knowledge that the facility or community is not, or will not be, eligible for the exemption; and

(ii) The facility or community has stated formally in writing that the facility or community complies with the requirements for the exemption.

(e) Nothing in this subchapter prohibits discrimination against a person because the person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. § 802.

History. Acts 2001, No. 1785, § 8; 2003, No. 1775, § 2.

Publisher's Notes. As enacted in 2001, subsection (e) provided: "Nothing in this subchapter prohibits discrimination against a person because the person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. § 802 as in effect January 1, 2001."

Amendments. The 2003 amendment added "unless membership in the religion is restricted on account of race, color, or national origin" at the end of (a)(1)(A); and made minor punctuation changes.

16-123-308. Exemption — Appraisals.

Nothing in this subchapter prohibits a person engaged in the business of furnishing evaluations, market analyses, or appraisals of real property to take into consideration factors other than race, color, religion, sex, disability, familial status, or national origin.

History. Acts 2001, No. 1785, § 9.

16-123-309. Effect on other law.

This subchapter does not affect a requirement of nondiscrimination in any other act, state law, or federal law.

History. Acts 2001, No. 1785, § 10.

16-123-310. Discrimination in sale or rental of housing.

(a) Because of race, color, religion, sex, familial status, or national origin a person shall not:

(1) Refuse to sell or rent a dwelling to a person who has made a bona fide offer;

(2) Refuse to negotiate for the sale or rental of a dwelling; or

(3) Otherwise make unavailable or deny a dwelling to any person.

(b) A person shall not discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with the sale or rental because of race, color, religion, sex, familial status, or national origin.

History. Acts 2001, No. 1785, § 11; 2003, No. 1775, § 3.

Publisher's Notes. As enacted in 2001, subsection (c) provided: "This section does not prohibit discrimination against a person because the person has been convicted under federal law or the law of any state of the illegal manufacture or distribution of a controlled substance as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. § 802 as in effect January 1, 2001."

Amendments. The 2003 amendment deleted (c).

16-123-311. Publication indicating discrimination.

A person shall not make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, disabil-

ity, familial status, or national origin, or an intention to make such a preference, limitation, or discrimination.

History. Acts 2001, No. 1785, § 12.

16-123-312. Availability for inspection.

A person shall not represent to any person because of race, color, religion, sex, disability, familial status, or national origin that a dwelling is not available for inspection, sale, or rental when the dwelling is in fact so available.

History. Acts 2001, No. 1785, § 13.

16-123-313. Entry into neighborhood.

A person shall not for profit induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into a neighborhood of a person of a particular race, color, religion, sex, disability, familial status, or national origin.

History. Acts 2001, No. 1785, § 14.

16-123-314. Disability.

(a) A person shall not discriminate in the sale or rental or otherwise make unavailable or deny a dwelling to a buyer or renter because of a disability of:

(1) That buyer or renter;

(2) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(3) A person associated with that buyer or renter.

(b) A person shall not discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of:

(1) That person;

(2) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(3) A person associated with that person.

(c) For purposes of this section only, "discrimination" includes:

(1) A refusal to permit, at the expense of the person with the disability, reasonable modifications of existing premises occupied or to be occupied by the person with the disability if the modifications may be necessary to afford the person with the disability full enjoyment of the premises, except that an owner may:

(A) Where reasonable to do so, reasonably condition permission for modifications upon the agreement of the person with the disability to restore the premises to its condition as it existed prior to modification, reasonable wear and tear excepted; and

(B) Reasonably condition the permission on the person with a disability's providing to the owner a reasonable description of the proposed modifications and reasonable assurance that all work will be done in a professional manner, all required permits for the work timely obtained, and all work timely paid for;

(2) A refusal to make reasonable accommodations in rules, policies, practices, or services, when the accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling, including public and common use areas; and

(3) In connection with the design and construction of covered multifamily dwellings for first occupancy after February 1, 2004, a failure to design and construct those dwellings in a manner that:

(A) Makes the public use and common use portions of the dwellings readily accessible to and usable by persons with a disability;

(B) Makes all the doors designed to allow passage into and within all premises within the dwellings sufficiently wide to allow passage by persons in wheelchairs; and

(C) Makes all premises within the dwellings contain the following features of adaptive design:

(i) An accessible route into and through the dwelling;

(ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) Reinforcements in bathroom walls to allow later installations of grab bars; and

(iv) Usable kitchens and bathrooms so that an individual in a wheelchair can maneuver about the space.

(d) Compliance with the appropriate requirements of the American National Standard Institute, as in effect January 1, 2001, for buildings and facilities providing accessibility and usability for persons with a physical disability, commonly cited as ANSI A 117.1 suffices to satisfy the requirements of subdivision (c)(3) of this section.

(e) As used in subdivision (c)(3) of this section, the term "covered multifamily dwellings" means:

(1) Buildings consisting of four (4) or more units if the buildings have one (1) or more elevators; and

(2) Ground floor units in other buildings consisting of four (4) or more units.

(f) Nothing in this subchapter requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

History. Acts 2001, No. 1785, § 15.

Publisher's Notes. As amended in 2001, subsection (d) provided: "Compliance with the appropriate requirements of the American National Standard Institute as in effect January 1, 2001, for buildings and facilities providing accessibility and usability for persons with a physical disability, commonly cited as ANSI A 117.1 suffices to satisfy the requirements of subdivision (c)(3) of this section."

16-123-315. Residential real estate related transaction.

(a) A person whose business includes engaging in residential real estate related transactions shall not discriminate against a person in making a real estate related transaction available, or in the terms or conditions of a real estate related transaction because of race, color, religion, sex, disability, familial status, or national origin.

(b) In this section, "residential real estate related transaction" means making or purchasing loans or providing other financial assistance:

(1) To purchase, construct, improve, repair, or maintain a dwelling; or

(2) Secured by residential real estate; or

(3) Selling, brokering, or appraising residential real property.

History. Acts 2001, No. 1785, § 16.

16-123-316. Brokerage services.

A person shall not deny persons access to or membership or participation in a multiple listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or discriminate against a person in the terms or conditions of access, membership, or participation in such an organization, service, or facility because of race, color, religion, sex, disability, familial status, or national origin.

History. Acts 2001, No. 1785, § 17.

16-123-317. Complaint.

(a) The Director of the Arkansas Fair Housing Commission shall investigate any discriminatory housing practices alleged in a complaint filed under this section.

(b) A complaint shall be:

(1) In writing and under oath; and

(2) In the form specified and standardized by this subchapter and the regulations promulgated by the Arkansas Fair Housing Commission which shall not require that the complaint be notarized.

(c) An aggrieved person shall not file, later than one (1) year after an alleged discriminatory housing practice has occurred or terminated, a complaint with the commission alleging the discriminatory housing practice.

(d) Not later than one (1) year after an alleged discriminatory housing practice has occurred or terminated, the commission may file its own complaint.

(e) A complaint may be reasonably and fairly amended at any time.

(f) On the filing of a complaint the director shall:

(1) Give the aggrieved person notice that the complaint has been received;

(2) Advise the aggrieved person of the time limits and choice of forums under this subchapter; and

(3) Not later than the tenth day after the filing of the complaint or after the identification of an additional respondent under § 16-123-320, provide each respondent:

(A) Notice identifying the alleged discriminatory housing practice and advising the respondent of the procedural rights and obligations of a respondent under this subchapter; and

(B) A copy of the original complaint.

History. Acts 2001, No. 1785, § 18.

16-123-318. Answer.

(a) Not later than the tenth day after receipt of the notice and a copy of the complaint as required by § 16-123-317(f)(3), a respondent may file an answer to the complaint.

(b) An answer must be:

(1) In writing;

(2) Under oath; and

(3) In the form specified and standardized by this subchapter and the regulations promulgated by the Arkansas Fair Housing Commission, which shall not require that the answer be notarized.

(c) An answer may be reasonably and fairly amended at any time.

History. Acts 2001, No. 1785, § 19; 2003, No. 1775, § 4.

Amendments. The 2003 amendment, in (b)(3), substituted "Arkansas Fair Housing Commission" for "commission" and "answer" for "complaint."

16-123-319. Investigation.

(a) The Director of the Arkansas Fair Housing Commission shall investigate all complaints, and except as provided by subsection (b) of this section, shall commence an investigation within thirty (30) days of receiving the complaint and shall complete the investigation no later than the one hundredth day after the complaint is filed, and shall dispose of all administrative proceedings related to the investigation not later than the first anniversary after the complaint is filed.

(b) If the director is unable to complete an investigation within the time periods prescribed by subsection (a) of this section, the director shall notify the complainant and the respondent in writing of the reasons for the delay.

(c) If the director is unable to begin an investigation within the time periods prescribed in subsection (a) of this section, the director shall notify the complainant and the respondent in writing of the reasons for the delay.

(d) If the director is unable to dispose of all administrative proceedings related to the investigation of a complaint within one (1) year after the complaint is filed, the director shall notify the complainant and the respondent in writing of the reasons for the delay.

History. Acts 2001, No. 1785, § 20.

16-123-320. Additional or substitute respondent.

(a) The Director of the Arkansas Fair Housing Commission may join a person not named in the complaint as an additional or substitute respondent if, in the course of the investigation, the director determines that the person may have committed a discriminatory housing practice.

(b) In addition to the information required in the notice under § 16-123-317(f)(3), the director shall include in a notice to a respondent joined under this section an explanation of the basis for the determination that the person is properly joined as a respondent.

History. Acts 2001, No. 1785, § 21.

16-123-321. Conciliation.

(a) The Director of the Arkansas Fair Housing Commission, during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal by the director or the commission, to the extent feasible, shall engage in conciliation with respect to the complaint.

(b) A conciliation agreement reached through conciliation is a written agreement between a respondent, the complainant, and the commission requiring approval from all three (3).

(c)(1) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint.

(2) A conciliation agreement may authorize appropriate relief, including monetary relief.

(d) A conciliation agreement shall be made public, unless the complainant and respondent agree otherwise and the director determines that disclosure is not necessary to further the purposes of this subchapter.

(e) If the director has reasonable cause to believe that a respondent has breached a conciliation agreement, the director may authorize and the Attorney General may file a civil action for the enforcement of the conciliation agreement as provided by § 16-123-330 or the Attorney General may authorize the director to hire outside counsel to seek enforcement.

(f) No statements or actions made within the course of conciliation may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

(g) After completion of the director's investigation, the director shall make available to the aggrieved person and the respondent, at any time, information derived from the investigation and the final report related to that investigation.

History. Acts 2001, No. 1785, § 22; 2005, No. 250, § 1.

Amendments. The 2005 amendment, in (e), substituted "director may authorize and the Attorney General may" for "Attorney General shall be directed to" and

added "or the Attorney General may authorize the director to hire outside counsel to seek enforcement" at the end.

16-123-322. Temporary or preliminary relief.

(a) If the Director of the Arkansas Fair Housing Commission concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter, and after consultation with the office of the Attorney General, the director may authorize the filing by the Attorney General and the Attorney General may file a civil action in a court of competent jurisdiction in the county where the respondent resides for appropriate temporary or preliminary relief pending final disposition of the complaint or the Attorney General may authorize the director to hire outside counsel to seek the relief.

(b) The filing of a civil action under this section does not affect the initiation or continuation of an administrative proceeding entitled "administrative hearing" under § 16-123-331.

History. Acts 2001, No. 1785, § 23; 2005, No. 250, § 2.

Amendments. The 2005 amendment, in (a), substituted "and the Attorney General may file" for "of" and added "or the Attorney General may authorize the director to hire outside counsel to seek the relief" at the end.

16-123-323. Investigative report.

(a) The Director of the Arkansas Fair Housing Commission shall prepare a final investigative report showing:

(1) The names and dates of contacts with witnesses;

(2) A summary of correspondence and other contacts with the aggrieved person and the respondent showing the dates of the correspondence and contacts;

(3) A summary description of other pertinent records;

(4) A summary of witness statements; and

(5) Answers to interrogatories.

(b) A final report under this section may be amended if additional evidence is later discovered.

History. Acts 2001, No. 1785, § 24.

16-123-324. Reasonable cause determination.

(a) The Director of the Arkansas Fair Housing Commission shall determine, based on the facts and after consultation with the office of the Attorney General, whether reasonable cause exists to believe that a discriminatory housing practice occurred or is about to occur.

(b) The director shall make the determination under subsection (a) of this section not later than the one hundredth day a complaint is filed unless:

(1) It is impracticable to make the determination; or

(2) The director has approved a conciliation agreement relating to the complaint.

(c) If it is impracticable to make the determination within the time period provided by subsection (b) of this section, the director shall notify the complainant and respondent in writing of the reasons for the delay.

(d) If the director determines that reasonable cause exists to believe that a discriminatory housing practice occurred or is about to occur, the director shall immediately issue a charge on behalf of the aggrieved person, except as provided by § 16-123-326.

History. Acts 2001, No. 1785, § 25.

16-123-325. Charge.

(a) A charge issued under § 16-123-324 shall:

(1) Consist of a short and plain statement of the facts on which the Director of the Arkansas Fair Housing Commission has found reasonable cause to believe that a discriminatory housing practice occurred or is about to occur;

(2) Be based on the investigation; and

(3) Not necessarily be limited to the facts or grounds alleged in the complaint.

(b) The director shall immediately send a copy of the charge with information concerning the process of election of judicial determination, as under § 16-123-329, to:

(1) Each respondent, together with a notice of the opportunity for a hearing provided by § 16-123-331; and

(2) Each aggrieved person on whose behalf the complaint was filed.

History. Acts 2001, No. 1785, § 26; 2003, No. 1775, § 5.

Amendments. The 2003 amendment, in (b), deleted "Not later than the tenth day after the director issues a charge" from the beginning and inserted "immediately."

16-123-326. Land use law.

If the Director of the Arkansas Fair Housing Commission determines the matter involves the legality of a state or local zoning ordinance or other land use law or ordinance, the director shall not issue a charge, but shall immediately refer the matter to the Attorney General for appropriate action.

History. Acts 2001, No. 1785, § 27.

16-123-327. Dismissal.

(a) If the Director of the Arkansas Fair Housing Commission determines that no reasonable cause exists to believe that a discriminatory housing practice occurred or is about to occur, the director shall promptly dismiss the complaint.

(b) The director shall disclose each dismissal under this section both to the public and to all affected parties.

History. Acts 2001, No. 1785, § 28.

16-123-328. Pending civil trial.

The Director of the Arkansas Fair Housing Commission shall not issue a charge under this section regarding an alleged discriminatory housing practice after the commencement of a civil action commenced under federal or state law or this subchapter seeking determination with respect to an alleged discriminatory housing practice.

History. Acts 2001, No. 1785, § 29.

16-123-329. Election of judicial determination.

(a) After a charge has been issued under § 16-123-325, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed may elect to have the claims asserted in that charge decided in a civil action.

(b) The election shall be made no later than the twentieth day after the date of receipt by the electing person of service under § 16-123-325 or, in the case of the Arkansas Fair Housing Commission, not later than the twentieth day after the date the charge was issued.

(c) The person making the election shall give notice to the commission and to all other complainants and respondents to whom the charge relates.

History. Acts 2001, No. 1785, § 30.

16-123-330. Attorney General — Action for enforcement.

(a) If a timely election is made under § 16-123-329, the Arkansas Fair Housing Commission may authorize and the Attorney General may file and maintain on behalf of the aggrieved party a civil action in a court of competent jurisdiction in the county where the respondent seeking appropriate relief under this section resides or the Attorney General may authorize the commission to hire outside counsel to pursue appropriate relief.

(b) If the commission determines, as under § 16-123-321, and after consultation with the office of the Attorney General, that a conciliation agreement has been breached by the respondent, the Attorney General may file a civil action on behalf of the aggrieved person in a court of competent jurisdiction in the county where the respondent seeking enforcement of the conciliation agreement resides or the Attorney General may authorize the commission to hire outside counsel to seek enforcement of the conciliation agreement.

(c) Venue for an action under this section is in a court of competent jurisdiction in the county where the respondent resides.

(d) An aggrieved person may intervene in the action.

(e) If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief that a court may grant in a civil action under this subchapter.

History. Acts 2001, No. 1785, § 31; 2003, No. 1775, § 6; 2005, No. 250, § 3.

Amendments. The 2003 amendment deleted "by a complainant" following "is made" in (a).

The 2005 amendment substituted "may" for "shall" twice in (a) and in (b); added "or the Attorney General may authorize the commission to hire outside counsel to pursue appropriate relief" at the end of (a); and added "or the Attorney General may authorize the commission to hire outside counsel to seek enforcement of the conciliation agreement" at the end of (b).

16-123-331. Administrative hearing.

(a)(1) If a timely election to commence a civil action is not made under § 16-123-329, the Arkansas Fair Housing Commission shall provide for an administrative hearing on the charge.

(2)(A) The administrative hearing will be adjudicated by the commission.

(B) In that proceeding or any factually related proceeding under this section, no officer, employee, or agent of the state of Arkansas engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding shall participate in or advise on the decision of the commission, except as a witness or counsel during the proceedings.

(b) Except as provided in this section, the Arkansas Administrative Procedure Act, § 25-15-201 et seq., governs a hearing and an appeal of a hearing under this section.

History. Acts 2001, No. 1785, § 32.

16-123-332. Administrative penalties.

(a) If the Arkansas Fair Housing Commission determines at a hearing under § 16-123-331 that a respondent has engaged in or is about to engage in a discriminatory housing practice, the commission may order the appropriate relief, including actual damages, reasonable attorney's fees, and court costs.

(b) To vindicate the public interest, the commission may assess a civil penalty against the respondent in an amount that does not exceed:

(1) Eleven thousand dollars ($11,000) if the respondent has not been adjudged by order of the commission or a court to have committed a prior discriminatory housing practice;

(2) Except as provided by subsection (c) of this section, twenty-seven thousand five hundred dollars ($27,500) if the respondent has been adjudged by order of the commission or a court to have committed one (1) other discriminatory housing practice during the five-year period ending on the date of the filing of this charge; and

(3) Except as provided by subsection (c) of this section, fifty-five thousand dollars ($55,000) if the respondent has been adjudged by

order of the commission or a court to have committed three (3) or more discriminatory housing practices during the five-year period ending on the date of the filing of the charge.

(c) If the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, the civil penalties in subdivisions (b)(2) and (3) of this section may be imposed without regard to the period of time within which any other discriminatory housing practice occurred.

(d) In addition to all other penalties set forth in this subchapter, the commission may require the respondent to complete up to thirty (30) classroom hours of fair housing education courses designated by the commission or up to thirty (30) hours of community service designated by the commission, or both.

History. Acts 2001, No. 1785, § 33; 2003, No. 1775, § 7.

Amendments. The 2003 amendment substituted "natural person" for "individual" in (c).

16-123-333. Effect of a commission order.

An Arkansas Fair Housing Commission order under § 16-123-331 does not affect any contract, sale, encumbrance, or lease that:

(1) Was consummated before the commission issued the order; and

(2) Involved a bona fide purchaser, encumbrancer, or tenant who did not have actual notice of the charge filed under this subchapter.

History. Acts 2001, No. 1785, § 34.

16-123-334. Licensed or regulated businesses.

If the Arkansas Fair Housing Commission, § 16-123-303, issues an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a government agency, the commission, not later than the thirty (30) days after the issuance of the order, shall send copies of the findings of fact, conclusions of law, and the order to the governmental agency.

History. Acts 2001, No. 1785, § 35.

16-123-335. Cooperation with state and federal agencies.

(a) The Arkansas Fair Housing Commission is encouraged to cooperate with the Secretary of Housing and Urban Development and the Attorney General of the United States in the enforcement of the Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq., as in effect January 1, 2001, and may assist the Secretary of Housing and Urban Development or Attorney General of the United States in any way consistent with the policies of this subchapter.

(b) The commission shall treat a complaint referred by the Secretary of Housing and Urban Development or the Attorney General of the United States under the Fair Housing Act of 1968, 42 USC § 3601 et seq., as in effect January 1, 2001, as a complaint filed under this section.

History. Acts 2001, No. 1785, § 36.

Publisher's Notes. As amended in 2001, subsection (a) provided: "The Arkansas Fair Housing Commission is encouraged to cooperate with the Secretary of Housing and Urban Development and the Attorney General of the United States in the enforcement of the Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq., as in effect January 1, 2001, and may assist the Secretary of Housing and Urban Development or Attorney General of the United States in any way consistent with the policies of this subchapter."

16-123-336. Civil action.

(a) An aggrieved person may file a civil action in a court of competent jurisdiction in the county where the respondent resides not later than two (2) years after the occurrence or the termination of an alleged discriminatory housing practice or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to the discriminatory housing practice or enforcement of a conciliation agreement.

(b)(1) The two-year period does not include any time during which an administrative proceeding under this subchapter is pending with respect to a complaint or charge under this subchapter based on the discriminatory housing practice.

(2) This subsection does not apply to actions arising from a breach of a conciliation agreement.

(c) Except as otherwise provided in subsection (e) of this section, an aggrieved person may file an action under this section whether or not a complaint has been filed under § 16-123-317, and without regard to the status of any complaint filed under that section.

(d) If the Arkansas Fair Housing Commission has obtained a conciliation agreement with the consent of an aggrieved person, the aggrieved person may not file an action under this section with respect to the alleged discriminatory housing practice that forms the basis for the complaint except to enforce the terms of the agreement.

(e) An aggrieved person may not file a civil action under this section with respect to the alleged discriminatory housing practice forming the basis of that charge after the actual commencement of an administrative hearing.

History. Acts 2001, No. 1785, § 37; 2003, No. 1775, § 8.

Amendments. The 2003 amendment rewrote (e).

16-123-337. Court-appointed attorney.

On application by a person alleging a discriminatory housing practice or by a person against whom a discriminatory housing practice is

alleged, the court may appoint an attorney for the person to the extent provided by applicable law concerning indigents in civil actions.

History. Acts 2001, No. 1785, § 38.

16-123-338. Relief.

In a civil action under this subchapter, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff:

(1) Compensatory and punitive damages;

(2) Reasonable attorney's fees;

(3) Court costs; and

(4) Subject to § 16-123-339, any permanent or temporary injunction, temporary restraining order, or other order, including an order enjoining the defendant from engaging in the discriminatory housing practice or ordering affirmative action as may be appropriate.

History. Acts 2001, No. 1785, § 39.

16-123-339. Effect if relief granted.

Relief granted under this subchapter does not affect a contract, sale encumbrance, or lease that:

(a) Was consummated before the granting of the relief; and

(b) Involved a bona fide purchaser, encumbrancer, or tenant who did not have actual notice of the filing of a complaint under this subchapter or a civil action under this subchapter.

History. Acts 2001, No. 1785, § 40.

16-123-340. Intervention by Attorney General.

(a) The Arkansas Fair Housing Commission may authorize the Attorney General to intervene and the Attorney General may intervene in an action if the case is of general public importance.

(b) The Attorney General may obtain the same relief available under § 16-123-341.

History. Acts 2001, No. 1785, § 41; 2005, No. 250, § 4.

Amendments. The 2005 amendment substituted "The Arkansas Fair Housing Commission may authorize the Attorney General to intervene and the Attorney General may intervene in an action if" for "At the request of the Arkansas Fair Housing Commission, the Attorney General may intervene in an action if the commission certifies and the Attorney General concurs that" in (a).

16-123-341. Pattern and practice cases.

(a) At the request of the Arkansas Fair Housing Commission, the Attorney General may file a civil action in a court of competent jurisdiction in the county where the respondent resides for appropriate relief if the Attorney General has reasonable cause to believe that:

(1) A person is engaged in a pattern or practice of resistance to the full enjoyment of any right granted by this subchapter; or

(2) A person has been denied any right granted by this subchapter and that denial raises an issue of general public importance.

(b) In an action under this section the court may:

(1) Award preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this subchapter as necessary to assure the full enjoyment of the right granted by this subchapter;

(2) Award other appropriate relief, including monetary damages, reasonable attorney's fees, and court costs; and

(3) To vindicate the public interest, assess a civil penalty against the respondent in an amount that does not exceed:

(A) Fifty thousand dollars ($50,000) for a first violation; and

(B) One hundred thousand dollars ($100,000) for a second or subsequent violation.

(c) A person may intervene in an action under this section if the person is:

(1) An aggrieved person to the discriminatory housing practice; or

(2) A party to a conciliation agreement concerning the discriminatory housing practice.

History. Acts 2001, No. 1785, § 42.

16-123-342. Subpoena enforcement.

The Arkansas Fair Housing Commission, on behalf of itself or other party at whose request a subpoena is issued under this subchapter, may enforce the subpoena in appropriate proceedings in a court of competent jurisdiction in the county where the respondent resides.

History. Acts 2001, No. 1785, § 43.

16-123-343. Prevailing party.

(a) A court in a civil action brought under this subchapter or the Arkansas Fair Housing Commission in an administrative hearing under § 16-123-331 may award reasonable attorney's fees to the prevailing party.

(b) However, nothing contained in this subchapter shall waive the sovereign immunity of the State of Arkansas or any of its officials, agencies, departments, boards, or commissions.

History. Acts 2001, No. 1785, § 44; 2005, No. 250, § 5.

Amendments. The 2005 amendment inserted the subdivision (a) designation; deleted "and assess costs against the nonprevailing party" at the end of (a); and added (b).

16-123-344. Intimidation or interference.

A person commits an offense if the person, whether or not acting under color of law, intentionally intimidates or interferes with or attempts to intimidate or interfere with a person:

(1) Because of the person's race, color, religion, sex, disability, familial status, or national origin and because the person is or has been selling, purchasing, renting, financing, occupying, or contracting, or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling or applying for or participating in a service, organization, or facility relating to the business of selling or renting dwellings; or

(2) Because the person is or has been, or to intimidate the person from:

(A) Participating, without discrimination because of race, color, religion, sex, disability, familial status, or national origin, in an activity, service, organization, or facility described in subdivision (1) of this section;

(B) Affording another person opportunity or protection to so participate; or

(C) Lawfully aiding or encouraging other persons to participate, without discrimination because of race, color, religion, sex, disability, familial status, or facility described in subdivision (1) of this section.

History. Acts 2001, No. 1785, § 45; 2003, No. 1775, § 9.

Amendments. The 2003 amendment deleted (b).

16-123-345. Incentives for self-testing and self-correction.

(a)(1) A report or result of a self-test, as that term is defined by regulation of the Director of the Arkansas Fair Housing Commission, shall be considered to be privileged under subdivision (a)(2) of this section if a person:

(A) Conducts or authorizes an independent third party to conduct a self-test of any aspect of a residential real estate-related lending transaction or any part of that transaction by that person in order to determine the level or effectiveness of compliance with this subchapter by that person; and

(B) Has identified any possible violation of this subchapter by that person and has taken, or is taking, appropriate corrective action to address any such possible violation.

(2) If a person meets the conditions specified in subdivision (a)(1) of this section with respect to a self-test, any report or results of that self-test:

(A) Shall be privileged; and

(B) May not be obtained or used by the Arkansas Fair Housing Commission or any applicant, department, or agency in any:

(i) Proceeding or civil action in which one (1) or more violations of this subchapter are alleged; or

(ii) Examination or investigation relating to compliance with this subchapter.

(b)(1) No provision of this subchapter may be construed to prevent an aggrieved person, complainant, department, or agency from obtaining or using a report or results of any self-test in any proceeding or civil action in which a violation of this subchapter is alleged, or in any examination or investigation of compliance with this subchapter if:

(A) The person to whom the self-test relates or any person with lawful access to the report or the results:

(i) Voluntarily releases or discloses all or any part of the report or results to the commission, aggrieved person, complainant, department, or agency or to the general public; or

(ii) Refers to or describes the report or results as a defense to charges of violations of this subchapter against the person to whom the self-test relates; or

(B) The report or results are sought in conjunction with an adjudication or admission of a violation of this subchapter for the sole purpose of determining an appropriate penalty or remedy.

(2) Any report or results of a self-test that are disclosed for the purpose specified in subdivision (b)(1)(B) of this section:

(A) Shall be used only for the particular proceeding in which the adjudication or admission referred to in subdivision (b)(1)(B) of this section is made; and

(B) May not be used in any other action or proceeding.

(c) An aggrieved person, complainant, department, agency, or the commission that challenges a privilege asserted under this section may seek a determination of the existence and application of that privilege in:

(1) A court of competent jurisdiction; or

(2) An administrative law proceeding with appropriate jurisdiction.

History. Acts 2001, No. 1785, § 46; 2003, No. 1775, §§ 10, 11.

Amendments. The 2003 amendment substituted "May" for "Shall" in (a)(2)(B) and (b)(2)(B); and substituted "Arkansas Fair Housing Commission" for "commission" in (a)(2)(B).

16-123-346. Fair housing education program.

(a) The Director of the Arkansas Fair Housing Commission shall establish a statewide education and outreach program through contracts with local governments or their agencies, public or private nonprofit organizations or institutions, or other public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices.

(b) The program shall be designed to provide a centralized, coordinated effort for the development and dissemination of fair housing media products, including:

(1) Public service announcements, both audio and video;

(2) Television, radio, and print advertisements;

(3) Posters; and

(4) Pamphlets and brochures.

(c) The director shall encourage cooperation with real estate industry organizations in the statewide education and outreach program.

(d) The director shall encourage the dissemination of educational information and technical assistance to support compliance with the housing adaptability and accessibility guidelines contained in the Fair Housing Act Amendments of 1988.

History. Acts 2001, No. 1785, § 47.
U.S. Code. The Fair Housing Act Amendments of 1988 are codified as 42 U.S.C §§ 3601-3631 and §§ 2341-2342.

16-123-347. Arkansas Fair Housing Commission Trust Fund.

(a) There is hereby established on the books of the Treasurer of State, Auditor of State, and Chief Fiscal Officer of the State a fund to be known as the "Arkansas Fair Housing Commission Trust Fund".

(b) The fund shall consist of:

(1) Funds received by the Arkansas Fair Housing Commission, and any other moneys as may be provided by the General Assembly, there to be used for the administration and operations of the commission; and

(2) Any administrative or civil penalty levied and collected pursuant to this subchapter to be solely used for fair housing education of the public and the operational expenses of the commission.

(c) The appropriation to the Arkansas Fair Housing Commission providing for "public education" may be used to fund all expenses incurred in conducting educational seminars and other forms of educational projects for use and benefit generally of the public, including the production and distribution of information literature of an educational nature.

History. Acts 2001, No. 1785, § 48; 2003, No. 1011, § 3.
Amendments. The 2003 amendment added (c).

16-123-348. Violations — Bodily injury — Penalties.

(a) It is unlawful for a person, whether or not acting under color of law, by force or threat of force, to willfully injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with:

(1) Any person because of his or her race, color, religion, sex, disability, as defined in § 16-123-302, familial status, as defined in § 16-123-302, or national origin or because the person is or has been selling, purchasing, renting, financing, occupying or contracting or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organizations, or facility relating to the business of selling or renting dwellings;

(2) Any person because he or she is or has been, or in order to intimidate the person or any other person or any class of persons from:

(A) Participating, without discrimination on account of race, color, religion, sex, disability, as defined in § 16-123-302, familial status, as defined in § 16-123-302, or national origin, in any of the activities,

services, organizations or facilities described in subdivision (a)(1) of this section; or

(B) Affording any person or class of persons opportunity or protection so to participate; or

(3) Any citizen because he or she is or has been, or in order to discourage the citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, disability, as defined in § 16-123-302, familial status, as defined in § 16-123-302, or national origin, in any of the activities, services, organizations or facilities described in subdivision (a)(1) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

(b) A person who violates any provision of subsection (a) of this section shall:

(1) If the violation results in bodily injury, be fined not more than two hundred fifty thousand dollars ($250,000) or be imprisoned for not more than ten (10) years, or both;

(2) If the violation results in death, be imprisoned for not less than ten (10) years or life;

(3) If the violation results in property damage exceeding one hundred dollars ($100) or if the violation involves the use or attempted use of fire or a firearm, be fined not more than two hundred fifty thousand dollars ($250,000) or be imprisoned for not more than five (5) years, or both; or

(4) Otherwise, be fined not more than one hundred thousand dollars ($100,000) or be imprisoned for not more then one (1) year, or both.

History. Acts 2001, No. 1785, § 49; 2003, No. 1775, § 12.

Amendments. The 2003 amendment deleted former (b) and (c); and added present (b).

CHAPTER 124

DRUG DEALER LIABILITY ACT

SECTION.
16-124-101. Short title.
16-124-102. Definitions.
16-124-103. Liability in general.
16-124-104. Damages caused by illegal drug use — Distribution.
16-124-105. Action by drug user prohibited — Exceptions.
16-124-106. Joinder.
16-124-107. Right of action for contribution.
16-124-108. Evidence of participation in the illegal drug market.
16-124-109. Illegal drug market target community.
16-124-110. Attachment against assets.
16-124-111. Statute of limitations.
16-124-112. Actions by state — Stays of action.

16-124-101. Short title.

This chapter shall be known and may be cited as the "Drug Dealer Liability Act".

History. Acts 1995, No. 896, § 1.

16-124-102. Definitions.

As used in this chapter:

(1) "Illegal drug" means a drug whose distribution is a violation of the Uniform Controlled Substances Act, § 5-64-101 et seq.;

(2) "Illegal drug market" means the support system of illegal drug-related operations, from production to retail sales, through which an illegal drug reaches the user;

(3) "Illegal drug market target community" is the area described under § 16-124-109;

(4) "Individual drug user" means the individual whose illegal drug use is the basis of an action brought under this chapter;

(5) "Level one offense" means:

(A) Possession of one-quarter ounce (.25 oz.) or more but less than four ounces (4 ozs.), or distribution of less than one ounce (1 oz.), of a specified illegal drug; or

(B) Possession of one pound (1 lb.) or twenty-five (25) plants or more but less than four pounds (4 lbs.) or fifty (50) plants, or distribution of less than one pound (1 lb.), of marijuana;

(6) "Level two offense" means:

(A) Possession of four ounces (4 ozs.) or more but less than eight ounces (8 ozs.), or distribution of one ounce (1 oz.) or more but less than two ounces (2 ozs.), of a specified illegal drug; or

(B) Possession of four pounds (4 lbs) or more or fifty (50) plants or more but less than eight pounds (8 lbs.) or seventy-five (75) plants, or distribution of more than one pound (1 lb.) but less than ten pounds (10 lbs.), of marijuana;

(7) "Level three offense" means:

(A) Possession of eight ounces (8 ozs.) or more but less than sixteen ounces (16 ozs.), or distribution of two ounces (2 ozs.) or more but less than four ounces (4 ozs.), of a specified illegal drug; or

(B) Possession of eight pounds (8 lbs.) or more or seventy-five (75) plants or more but less than sixteen pounds (16 lbs.) or one hundred (100) plants, or distribution of more than five pounds (5 lbs.) but less than ten pounds (10 lbs.), of marijuana;

(8) "Level four offense" means:

(A) Possession of sixteen ounces (16 ozs.) or more, or distribution of four ounces (4 ozs.) or more, of a specified illegal drug; or

(B) Possession of sixteen pounds (16 lbs.) or more or one hundred (100) plants or more, or distribution of ten pounds (10 lbs.) or more, of marijuana;

(9)(A) "Participate in the illegal drug market" means to distribute, possess with an intent to distribute, commit an act intended to

facilitate the marketing or distribution of, or agree to distribute, possess with an intent to distribute, or commit an act intended to facilitate the marketing and distribution of, an illegal drug.

(B) "Participate in the illegal drug market" does not include the purchase or receipt of an illegal drug for personal use only;

(10) "Person" means an individual, a governmental entity, corporation, firm, trust, partnership, or incorporated or unincorporated association, existing under or authorized by the laws of this state, another state, or a foreign country;

(11)(A) "Period of illegal drug use" means, in relation to the individual drug user, the time of first use by an individual of an illegal drug to the accrual of the cause of action.

(B) The period of illegal drug use is presumed to commence two (2) years before the cause of action accrues, unless the defendant proves otherwise by clear and convincing evidence;

(12) "Place of illegal drug activity" means, in relation to the individual drug user, each county in which the individual possesses or uses an illegal drug or in which the individual resides, attends school, or is employed during the period of the illegal drug use of the individual, unless the defendant proves otherwise by clear and convincing evidence;

(13) "Place of participation" means, in relation to a defendant in an action brought under this chapter, each county in which the person participates in the illegal drug market or in which the person resides, attends school, or is employed during the period of the participation in the illegal drug market by the person; and

(14) "Specified illegal drug" means cocaine, heroin, or methamphetamine, and any other drug the distribution of which is a violation of state law."

History. Acts 1995, No. 896, § 2.

16-124-103. Liability in general.

(a) A person may recover damages under this chapter for injury resulting from the use of an illegal drug by that person.

(b) A person who knowingly participates in the illegal drug market is liable for civil damages as provided for in this chapter.

(c)(1) A law enforcement officer or agency, the state, or a person acting at the direction of a law enforcement officer or agency of the state, is not liable for participating in the illegal drug market, if the participation is in furtherance of an official investigation.

(2) A third party, including an insurance company, shall not be required to pay damages awarded under this chapter, nor shall any person be vicariously liable for the act of another, nor shall a third party be made a party to any action brought under this chapter.

History. Acts 1995, No. 896, §§ 3, 6.

16-124-104. Damages caused by illegal drug use — Distribution.

(a) One (1) or more of the following persons may bring an action in circuit court for damages caused by use of an illegal drug by an individual:

(1) A parent, legal guardian, child, spouse, or sibling of the individual drug user;

(2) An individual who was exposed to an illegal drug in utero;

(3) An employer of the individual drug user; and

(4) A medical facility, insurer, governmental entity, employer, or other entity that funds a drug treatment program or employee assistance program for the individual drug user or that otherwise expended money on behalf of the individual drug user.

(b) A person entitled to bring an action under this section may seek damages from one (1) or more of the following:

(1) A person who knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the individual drug user; or

(2) A person who knowingly participated in the illegal drug market if:

(A) The place of the illegal drug activity by the individual drug user is within the illegal drug market target community of the defendant;

(B) The participation of the defendant in the illegal drug market was connected with the same type of illegal drug used by the individual user; and

(C) The defendant participated in the illegal drug market at any time during the illegal drug use of the individual user.

(c) A person entitled to bring an action under this section may recover all of the following damages:

(1) Economic damages, including, but not limited to:

(A) The cost of treatment and rehabilitation;

(B) Medical expenses;

(C) Loss of economic or educational potential;

(D) Loss of productivity;

(E) Absenteeism;

(F) Support expenses;

(G) Accidents or injury; and

(H) Any other pecuniary loss proximately caused by the illegal drug use;

(2) Noneconomic damages, including, but not limited to:

(A) Physical and emotional pain;

(B) Suffering;

(C) Physical impairment;

(D) Emotional distress;

(E) Mental anguish;

(F) Disfigurement;

(G) Loss of enjoyment;

(H) Loss of companionship, services, and consortium; and

(I) Other nonpecuniary losses proximately caused by an individual's use of an illegal drug;

(3) Exemplary damages;

(4) Reasonable attorney's fees; and

(5) Costs of suit, including, but not limited to, reasonable expenses for expert testimony.

History. Acts 1995, No. 896, § 4.

16-124-105. Action by drug user prohibited — Exceptions.

(a)(1) An individual drug user shall not bring an action for damages caused by the use of an illegal drug, except as otherwise provided in this subsection.

(2) An individual drug user may bring an action for damages caused by the use of an illegal drug only if all of the following conditions are met:

(A) The individual personally discloses to narcotics enforcement authorities, more than six (6) months before filing the action, all the information known to the individual regarding his source of illegal drugs;

(B) The individual has not used an illegal drug within the six (6) months before filing the action; and

(C) The individual continues to remain free of the use of an illegal drug throughout the pendency of the action.

(b) A person entitled to bring an action under this section may seek damages only from a person who distributed, or is in the chain of distribution of, an illegal drug that was actually used by the individual drug user.

(c) A person entitled to bring an action under this section may recover only the following damages:

(1) Economic damages, including, but not limited to:

(A) The cost of treatment, rehabilitation, and medical expenses;

(B) Loss of economic or educational potential;

(C) Loss of productivity;

(D) Absenteeism;

(E) Accidents or injury; and

(F) Other pecuniary loss proximately caused by the person's illegal drug use;

(2) Reasonable attorney's fees; and

(3) Costs of suit, including, but not limited to, reasonable expenses for expert testimony.

History. Acts 1995, No. 896, § 5.

16-124-106. Joinder.

(a) Two (2) or more persons may join in one action under this chapter as plaintiffs if:

(1) Their respective actions have at least one (1) place of illegal drug activity in common; and

(2) Any portion of the period of illegal drug use overlaps with the period of illegal drug use for every other plaintiff.

(b) Two (2) or more persons may be joined in one (1) action under this chapter as defendants if those persons are liable to at least one (1) plaintiff.

(c) A plaintiff need not be interested in obtaining and a defendant need not be interested in defending against all the relief demanded.

(d) Judgment may be given for one (1) or more plaintiffs according to their respective liabilities.

History. Acts 1995, No. 896, § 8.

16-124-107. Right of action for contribution.

(a) A person subject to liability under this chapter has a right of action for contribution against another person subject to liability under this chapter.

(b) Contribution may be enforced either in the original action or by a separate action brought for that purpose.

(c) A plaintiff may seek recovery in accordance with this chapter and existing law against a person against whom a defendant has asserted a right of contribution.

History. Acts 1995, No. 896, § 9.

16-124-108. Evidence of participation in the illegal drug market.

(a)(1) Proof of participation in the illegal drug market in an action brought under this chapter shall be shown by clear and convincing evidence.

(2) Except as otherwise provided in this chapter, other elements of the cause of action shall be shown by a preponderance of the evidence.

(b)(1) A person against whom recovery is sought who has a criminal conviction pursuant to state drug laws or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Public Law 91-513, 84 Stat. 1236, 21 U.S.C. § 801 et seq.) is estopped from denying participation in the illegal drug market.

(2) Such a conviction is also prima facie evidence of the participation of the person in the illegal drug market during the two (2) years preceding the date of an act giving rise to a conviction.

(c) The absence of criminal drug conviction of a person against whom recovery is sought does not bar an action against that person.

History. Acts 1995, No. 896, § 10.

16-124-109. Illegal drug market target community.

A person whose participation in the illegal drug market constitutes the following level offense shall be considered to have the following illegal drug market target community:

(1) For a level one offense, the county in which the place of participation of the defendant is situated;

(2) For a level two offense, the target community described in subdivision (1) of this section along with all counties with a border contiguous to that target community;

(3) For a level three offense, the target community described in subdivision (2) of this section plus all counties with a border contiguous to that target community; and

(4) For a level four (4) offense, anywhere.

History. Acts 1995, No. 896, § 7.

16-124-110. Attachment against assets.

(a)(1) A plaintiff under this chapter, subject to subsection (c) of this section, may request an ex parte prejudgment attachment order from the court against all assets of a defendant sufficient to satisfy a potential award.

(2) If attachment is instituted, a defendant is entitled to an immediate hearing.

(3) Attachment may be lifted if the defendant demonstrates that the assets will be available for a potential award or if the defendant posts a bond sufficient to cover a potential award.

(b) A person against whom a judgment has been rendered under this chapter is not eligible to exempt any property, of whatever kind, from process to levy or process to execute on the judgment.

(c) Any assets sought to satisfy a judgment under this chapter that are named in a forfeiture action or have been seized for forfeiture by any state or federal agency may not be used to satisfy a judgment unless and until the assets have been released following the conclusion of the forfeiture action or released by the agency that seized the assets.

History. Acts 1995, No. 896, § 11.

16-124-111. Statute of limitations.

(a)(1) Except as otherwise provided in this section, a claim under this chapter shall not be brought more than three (3) years after the cause of action accrues.

(2) A cause of action accrues under this chapter when a person who may recover has reason to know of the harm from illegal drug use that is the basis for the cause of action and has reason to know that the illegal drug use is the cause of the harm.

(b)(1) For a plaintiff, the statute of limitations under this section is tolled when the individual potential plaintiff is incapacitated by the use

of an illegal drug to the extent that the individual cannot reasonably be expected to seek recovery under this chapter or as otherwise provided for by law.

(2) For a defendant, the statute of limitations under this section is tolled until six (6) months after the individual potential defendant is convicted of a criminal drug offense as otherwise provided for by law.

(c) The statute of limitations under this chapter for a claim based on participation in the illegal drug market that occurred prior to July 28, 1995, does not begin to run until July 28, 1995.

History. Acts 1995, No. 896, § 12.

16-124-112. Actions by state — Stays of action.

(a) The Attorney General may represent the state or a political subdivision of the state in an action under this chapter.

(b) On motion by a governmental agency involved in a drug investigation or prosecution, an action brought under this chapter shall be stayed until the completion of the criminal investigation or prosecution that gave rise to the motion for the stay of the action.

History. Acts 1995, No. 896, § 13.

CHAPTER 125

IMMUNITY FOR YEAR 2000 COMPUTER ERRORS

SECTION.
16-125-101. Findings.
16-125-102. Definitions.
16-125-103. Immunity against suits.
16-125-104. Remedial measures.

Effective Dates. Acts 1999, No. 1482, § 8: Apr. 15, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that the state and units of local government have taken due care to prepare for the date change that will accompany the year 2000; that the state has acted with diligence in addressing the year 2000 issue and in providing remedies when problems are identified; that these actions have been taken in an effort to ensure the continuity of state services to the citizens of Arkansas as the twentieth (20th) century nears an end; and that this act is immediately necessary. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-125-101. Findings.

The General Assembly finds that:

(1) The state and the state's political subdivisions have taken due care to prepare for the date change that will accompany the year 2000;

(2)(A) Beginning as early as 1995, the state began preparations and corrections for the computer systems.

(B) The state hired consulting companies having expertise and experience in year 2000 issues.

(C) The Governor took action to ensure that all agencies of state government were actively addressing year 2000 issues and had adequate resources to support their efforts.

(D) The General Assembly appropriated funds in 1997 for year 2000 corrections and held hearings from time to time to monitor the state's progress.

(E) The state has actively communicated with units of local government and the federal government to ensure year 2000 efforts were broadly coordinated;

(3)(A) It is estimated that state agencies will spend between fifty million dollars and sixty million dollars ($50,000,000 — $60,000,000) in assessment, remediation, and testing costs to prevent failures in computer systems and embedded systems.

(B) The efforts of the state are ongoing with respect to the year 2000; and

(4)(A) The state has acted with diligence in addressing the year 2000 issue and in providing remedies when problems are identified.

(B) All of these actions have been taken with every care to ensure the continuity of state services and government operations to the citizens of Arkansas as the first century of the technological era draws to a close.

History. Acts 1999, No. 1482, § 2.

16-125-102. Definitions.

As used in this chapter:

(1)(A) "Computer system" means any electronic device or collection of devices, including support devices, networks, and embedded chips that contains computer programs, electronic instructions, input data, and output data, and that performs functions, including, but not limited to, logic, arithmetic, data storage and retrieval, communication, and control.

(B) "Computer system" does not include calculators that are not programmable;

(2) "Government computer system" means any computer system owned or operated by a governmental entity;

(3) "Government employee" includes an officer or employee of a governmental entity, including a person acting on behalf of a governmental entity in an official capacity, temporarily or permanently, whether with or without compensation;

(4) "Governmental entity" means the State of Arkansas or any office, department, commission, council, board, committee, legislative body,

agency, institution, or any other establishment of the executive branch, judicial branch, or legislative branch of the state, or any municipality, county, school district, improvement district, or any political district or subdivision thereof; and

(5)(A) "Year 2000 compliant" means, with respect to a government computer system, that the system accurately processes date and time data from, into, and between the twentieth and twenty-first centuries and the years 1999 and 2000, and leap-year calculations.

(B) The processing of date and time data includes, but is not limited to:

(i) Calculating;

(ii) Comparing;

(iii) Projecting; and

(iv) Sequencing.

History. Acts 1999, No. 1482, § 1.

16-125-103. Immunity against suits.

(a) No action, except for declaratory or injunctive relief or illegal exactions, may be brought against a governmental entity or a government employee arising out of or based upon any failure of or error produced, calculated, or generated by a government computer system, which failure or error was a result of the system's not being year 2000 compliant, regardless of the cause of the system's not being year 2000 compliant.

(b) Nothing in this chapter shall provide immunity or release from liability to any person who:

(1) Deliberately tampers with a government computer system for the purpose of preventing it from being year 2000 compliant; or

(2) Receives and fails to immediately return a benefit which the person is not legally entitled to, arising out of or based upon any failure of or error produced, calculated, or generated by a government computer system as a result of the system's not being year 2000 compliant.

History. Acts 1999, No. 1482, § 3.

16-125-104. Remedial measures.

Nothing in this chapter shall prevent a governmental entity or a government employee from taking steps to remedy any failure of or error produced, calculated, or generated by a government computer system as a result of the system's not being year 2000 compliant, once the failure or error is verified.

History. Acts 1999, No. 1482, § 4.

CHAPTER 126

SALE OF ALCOHOL TO MINOR

SECTION.
16-126-101. In general.
16-126-102. Legislative findings and intent.
16-126-103. Civil liability for sale of alcohol to a minor.
16-126-104. Civil liability for sale of alcohol to clearly intoxicated person.
16-126-105. Consumption instead of sale as proximate cause of injury generally.
16-126-106. Immunity from civil liability.

Effective Dates. Acts 1999, No. 1596, § 10: Apr. 29, 1999. Approved without Governor's signature. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that recent court decisions indicate that the General Assembly must clarify the public policy of the State of Arkansas regarding liability for furnishing alcohol to a minor; that this act so provides; and that this act should go into effect as soon as possible in order that subsequent litigation be subject to this act. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

16-126-101. In general.

The General Assembly finds and determines that it needs to clarify and establish its legislative intent regarding the sale of alcoholic beverages as addressed by the Arkansas Supreme Court in Shannon v. Wilson, 329 Ark. 143, 947 S.W.2d 349 (1997) and Jackson v. Cadillac Cowboy, Inc., 337 Ark. 24, 986 S.W.2d 410 (1999).

History. Acts 1999, No. 1596, § 1.

CASE NOTES

In General.

The Dramshop Act's, § 16-126-101 et seq., proposed emergency clause: "this act should go into effect as soon as possible in order that subsequent litigation be subject to this act." 1999 Ark. Acts 1596, § 10, was not adopted by the General Assembly and was erroneously included in the codification of 1999 Ark. Acts 1596. Cadillac Cowboy, Inc. v. Jackson, 347 Ark. 963, 69 S.W.3d 383 (2002).

16-126-102. Legislative findings and intent.

The General Assembly finds and determines that the knowing sale of alcoholic beverages by a retailer to a minor is contrary to the public policy of the State of Arkansas.

History. Acts 1999, No. 1596, § 2.

16-126-103. Civil liability for sale of alcohol to a minor.

In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a minor or sold under circumstances where such retailer reasonably should have known such purchaser was a minor, a civil jury may determine whether or not such knowing sale constituted the proximate cause of any injury to such minor, or to a third person, caused by such minor.

History. Acts 1999, No. 1596, § 3.

16-126-104. Civil liability for sale of alcohol to clearly intoxicated person.

In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale or sold under circumstances where the retailer reasonably should have known the person was clearly intoxicated at the time of the sale, a civil jury may determine whether or not the sale constitutes a proximate cause of any subsequent injury to other persons. For purposes of this section, a person is considered clearly intoxicated when the person is so obviously intoxicated to the extent that, at the time of such sale, he presents a clear danger to others. It shall be an affirmative defense to civil liability under this section that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state.

History. Acts 1999, No. 1596, § 4.

CASE NOTES

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Duty of Care.

The General Assembly has established a high duty of care on the part of licensed alcohol vendors not to endanger the public health, welfare, or safety, and that duty is breached when vendors sell alcohol to intoxicated persons in violation of § 3-3-209. Cadillac Cowboy, Inc. v. Jackson, 347 Ark. 963, 69 S.W.3d 383 (2002).

Pleadings.

In order to sustain an action under this section, patrons had to establish in their pleadings a connection between the sale to a clearly intoxicated person and the subsequent injury to another person; because the patrons failed to plead the elements in that natural and continuous sequence, which was required by statute, their complaint was insufficient and was properly dismissed. Sluder v. Steak & Ale of Little Rock, Inc., — Ark. —, — S.W.3d —, 2005 Ark. LEXIS 196 (Mar. 31, 2005).

16-126-105. Consumption instead of sale as proximate cause of injury generally.

Except in the knowing sale of alcohol to a minor or to a clearly intoxicated person, the General Assembly hereby finds and declares that the consumption of any alcoholic beverage, rather than the furnishing of any alcoholic beverage, is the proximate cause of injuries

or property damage inflicted upon persons or property by a legally intoxicated person.

History. Acts 1999, No. 1596, § 5.

16-126-106. Immunity from civil liability.

In no event will the act of providing alcoholic beverages to a person who can lawfully possess them by a social host, or other person who does not hold an alcoholic beverage vendor's permit, constitute a proximate cause of any personal injuries or property damages which may be subsequently caused by an individual consuming any alcoholic beverages so provided.

History. Acts 1999, No. 1596. § 6.

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